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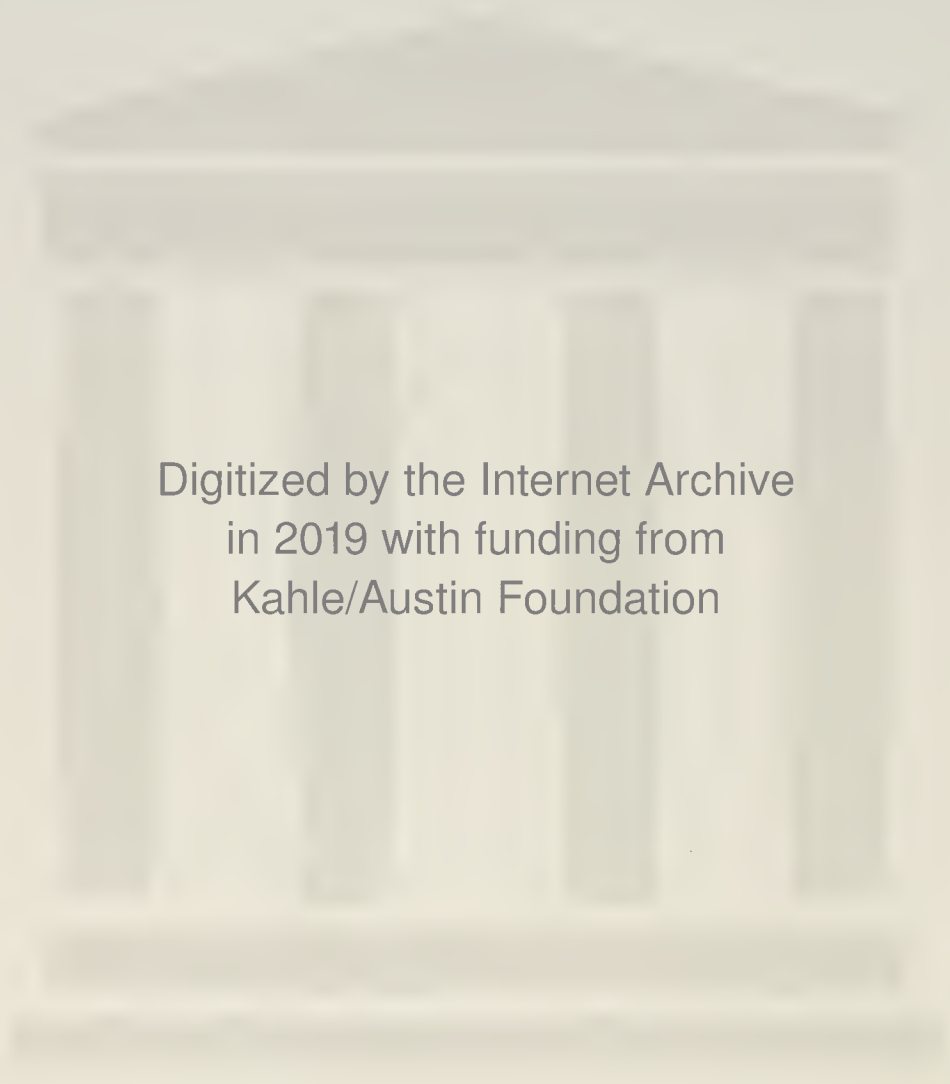
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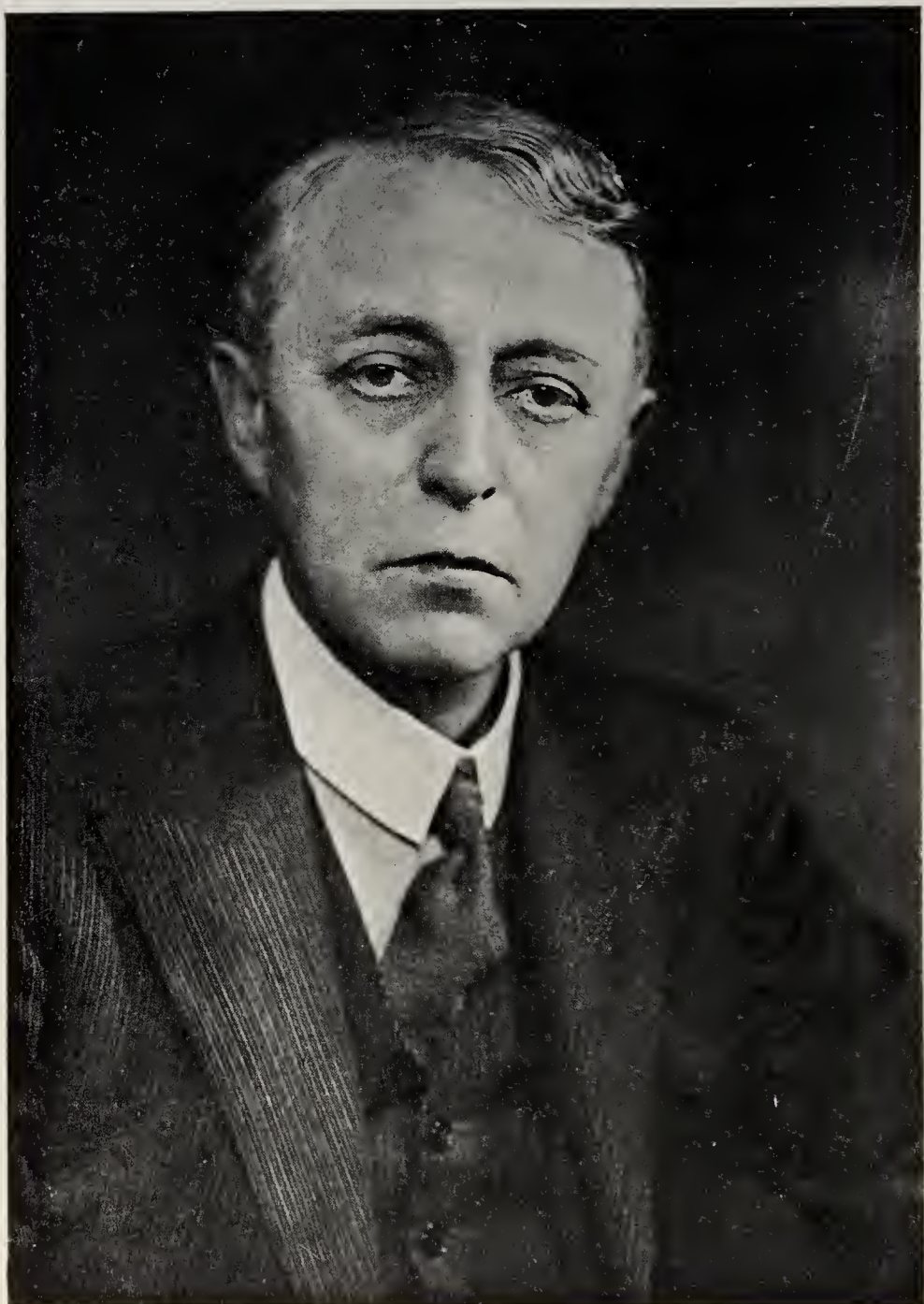
THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW



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# BRIERLY'S CONTRIBUTION TO INTERNATIONAL LAW<sup>1</sup>

By SIR HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A.

*Judge of the International Court of Justice*

## I

BRIERLY'S most significant—and perhaps most lasting—contribution to international law lies in the fact that during a period of transition and re-assessment of values he threw the weight of his writing and teaching in the scales of what may properly be regarded as a progressive conception of international law. From the outset he dissociated himself from the still predominant doctrines of rigid positivism. He had no hesitation in pointing to the beneficent potentialities of a revived law of nature as one of the main elements of the moral foundation of international law—for, upon final analysis, he saw no other basis for it. Largely for the latter reason he stressed the limitations of the view that States only, as distinguished from individuals, are subjects of international law. He affirmed, in opposition to the dualistic school of thought, the essential unity and identity of international and municipal law. He challenged, as being incompatible with the very notion of international law, the current conception of the international sovereignty of the State. On all these matters he did not aspire to have discovered new truths. All pretentiousness was alien to him. He did not claim to have founded sociological or similar schools of thought. Yet there are few writers on modern international law who have exhibited a greater capacity for searching painstakingly, at the risk of inconclusiveness and of creating occasionally the impression of contradiction, for some unifying element amidst the perplexing social reality of the relations of States—of States who, as he said, are civilized but for the primitive nature of their mutual relations.

The period which began at the end of the First World War, approximately at the time when Brierly was commencing his career as teacher and writer, witnessed the advent of radical changes in the doctrine of international law. In many ways these incipient changes were no more than expressions of developments in actual practice—to that extent they were truly positivist—but they nevertheless bore the mark of novelty. Those who attempted to give to them expression in terms of basic notions of international law were still looked upon as innovators. At the time when the present assessment of Brierly's contribution is being written, these

<sup>1</sup> For a biographical account of Professor Brierly's career and work as a writer and teacher see Professor C. H. M. Waldock's notice in *Annuaire de l'Institut de Droit international*, 1956.



apparently doctrinal difficulties seem to have received a quietus. With regard to many of them their approximation to actual practice has become too manifest to permit of doubt. Thus, having regard to the widely extended scope of international law and to other developments, it is now generally acknowledged that there remains little substance in the view—previously almost uncontested—that States only and exclusively are subjects of international law. The same applies to the rigidly conceived notion that the will of States is the only source of international law. This has also been the fate of the dogma that international and municipal law are fundamentally different and disparate—a dogma whose validity has become particularly doubtful at a time when the constitutional law of many countries has formally incorporated international law as part of the law of the land.

In these—as in some other—respects what in 1924 was iconoclastic has become almost orthodox. This is so although the reality of the changes which have been accomplished tends to be obscured by the more immediate reality of the insecurity and the precariousness of the international political scene. However, after the First World War, when Brierly was embarking upon his career as an international lawyer, the attack on positivism and its offshoots in their various manifestations had only begun. Brierly's adherence to the challenge, and the manner of his adherence to it, gave to the new tendencies a sustained accession of strength and authority. It is in this sense that Judge Charles de Visscher has recently referred to 'les écrits à la fois profonds et mesurés de J. L. Brierly'.<sup>1</sup> It is also from this point of view that it is intended to survey here the principal aspects of Brierly's contribution: the rejection of positivism, the affirmation of the moral foundation of international law, the recognition of the individual as a subject of international law, the vindication of the unity of international and municipal law, and his criticism of the notion of the international sovereignty of the State.

*Rejection of positivism.*—Brierly's rejection of positivism dates back to the very beginning of his work. Already in his inaugural lecture delivered in 1924 he deplored the fact that 'international law lost the most faithful seed of development that it has ever had when, far too early for the health of the system, though doubtless inevitably, its foundation in natural law was undermined'.<sup>2</sup> He deplored it, on that occasion, for the reason that the divorce from natural law, in depriving international law of a fruitful source of development, affected adversely the possibility of peaceful change—a subject which, as we shall see, became a recurring and somewhat laboured theme of his writings. However, his attitude to natural law was determined by more weighty reasons. It went to the roots of his

<sup>1</sup> *Théorie et réalités en droit international public* (2nd ed., 1955), p. 448.

<sup>2</sup> 'The Shortcomings of International Law', in this *Year Book*, 5 (1924), p. 9.

legal and political philosophy. Thus at the conclusion of his lectures, delivered in 1928, on the Basis of Obligation in International Law, we find him saying that, if we wish to go on living and acting, we are all bound to act as if we were convinced of the reality of an objective order, physical and moral. This, he said, amounts to a belief in a law of nature, but, he added, 'I confess that the modern revival of a modified law of nature seems to me to offer a prospect full of hope for the science of law'.<sup>1</sup>

He developed in his textbook<sup>2</sup> the same theme at greater length and by reference to its principal implications. He recognized the limitations and possible dangers of some of the doctrines of the law of nature inasmuch as they connote an immutability of its content or introduce the 'anarchical principle' which claims for natural law the power to overrule positive law in case of conflict. These valid criticisms did not, in his view, affect the 'paramount truths' in the conception of the law of nature—one of which truths is the emphasis upon the purpose and the ends of law, differently formulated in different times and places, as distinguished from law conceived as the will of the sovereign or as a mere conglomeration of principles mechanically applied by courts. Similarly, it is the law of nature—natural justice—which supplies the substance of decision in case of apparent gaps in the law in order to meet novel problems or situations. Thus viewed, such gaps are only apparent. In fact, it was largely owing to the place which he assigned to the law of nature that Brierly had no doubt about accepting the completeness of the legal order as a principle of administration of international justice.<sup>3</sup>

As in practically everything that he wrote, he did not weaken the force of his argument by a refusal to qualify it when necessary. Thus he recognized the service rendered by positivism inasmuch as it assisted in drawing more sharply the line between law and ethics.<sup>4</sup> Similarly, he had no hesitation in rejecting the doctrine of fundamental rights notwithstanding its association with doctrines of natural law and the service which it rendered in the formative period of international law.<sup>5</sup>

*The moral foundation of international law.*—It is not surprising, having regard to the place which he assigned to the law of nature, that he should have sought in ethics the ultimate foundations of international law. 'We are too often tempted to forget that the link between law and morals is much more fundamental than the difference between them and that the ultimate basis of the obligation to obey the law can only be a moral one. The problem of the binding nature of international law is only one

<sup>1</sup> 'Le Fondement du caractère obligatoire du droit international' (hereinafter cited as 'Fondement'), in *Recueil des Cours*, Académie de Droit International de la Haye, 23 (1928) (iii), p. 549.

<sup>2</sup> *The Law of Nations. An Introduction to the International Law of Peace* (5th ed., 1955), pp. 20–25 (hereinafter cited as *The Law of Nations*).

<sup>3</sup> See below, p. 17.

<sup>4</sup> 'Fondement', p. 547.

<sup>5</sup> *Ibid.*, p. 476. And see below, p. 8.



aspect of the binding character of law in general, in the same way as the latter is no more than an aspect of the wider problem of obligation in general. And this is a problem of ethics.<sup>1</sup> This, he was at pains to explain, does not mean that legal and moral obligations are of the same nature, or that in case of a conflict we are entitled to disregard the legal obligation in deference to what we conceive to be our moral duty. For we must always bear in mind such compensatory factors as the prospect of obtaining a modification of the law, the social evil resulting from the refusal to obey the law, and the possibility that we may be erring in our judgment as to the moral aspect of a particular rule. What the assumption of the ethical foundation of the law means, in the first instance, is that no other answer is possible to the question why it is that we must obey the law for no other reason than that it is the law.

However, it is clear that the assumption signified for him more than a formal statement that as a matter of logic the basis of international law must be non-juridical inasmuch as it is not possible to ground it exclusively on the consent or in the will of States—just as, as a matter of logic, the binding force of the highest and fundamental rule of law within the State cannot be based on a legal rule itself. In fact, one of the main reasons for his rejection of positivism was that its result 'has been to secularize the whole idea of law and thus to weaken the moral foundation which is essential to the vitality of all legal obligations'.<sup>2</sup> We shall see presently what were some of the practical consequences which he deduced from his view of the moral basis of international law.<sup>3</sup> In the present context it is sufficient to say that that view determined his entire approach to the practical application and the teaching of international law as when, in urging the rightful place of international law in the study of the law, he pointed to the close connexion between law, morals, and politics, and the consequent importance of international law for the philosophic study of the law, as well as the study of politics by the lawyer;<sup>4</sup> when he elaborated the theme of international law as an instrument of welfare operating by consent rather than as a system of coercion;<sup>5</sup> or when he stressed, in relation to international law, 'the right of private judgment according to the guidance of each man's conscience'—a right whose ultimate validity only a philosophy of totalitarianism could deny.<sup>6</sup>

<sup>1</sup> 'Fondement', p. 547 (the translation is the writer's).

<sup>2</sup> *The Law of Nations*, p. 45.

<sup>3</sup> See below, p. 13.

<sup>4</sup> 'International Law as a Subject of Education', in *Journal of the Society of Public Teachers of Law*, 1926, p. 5.

<sup>5</sup> *The Outlook for International Law* (1944), p. 106 (hereinafter cited as *Outlook*).

<sup>6</sup> 'Vitoria and International Law', in *Dublin Review*, July 1947, p. 11. In the same line of thought, although he believed that order precedes law—and not conversely—he was clear that 'although Hitler could probably have given order, or a sort of order, to Europe . . . he would never have given it law' (*Outlook*, p. 74).

For he was emphatic that as the law exists for the sake of the individual living in society, its final appeal must be directed to the individual and not to a non-existing collective conscience.<sup>1</sup> No system of law, he insisted, partakes of an absolute value; there is no rule, either of law or ethics, which is absolutely independent of the situation in which the individual is called upon to act. It is this aspect of his philosophy which largely explains his affirmation of the position of the individual human being as a possible subject of international law and his disinclination to concede that only States can be its subjects. This also made it wholly unnecessary for him to attach any importance to the view—heavily relied upon by some adherents of the modern realistic school in international relations—that as the collective conscience is untrammelled by the restraints of private morality, the moral content of international law and, correspondingly, the efficacy of international law as such, must be correspondingly reduced. For the question hardly arises if international law is conceived as being addressed, ultimately and actually, to individual human beings.

*The individual as a subject of international law.*—However, while Brierly's recognition of the place of the individual in international law was due in large measure to his acceptance of the moral basis of international law, this was not the only reason for his attitude in the matter. There were other reasons. In particular, in addition to the fact that international law already recognized in many ways the procedural capacity of individuals, he saw that some such developments in other directions corresponded to the realities of international life. Thus, although the State is, in some ways an expression of the unity of its subjects, it is not true that they have no other interests, including international interests, except those represented by their State.<sup>2</sup> From this point of view, the rule that States are subjects of international law is no more than a rule of convenience; there is no sacrosanctity about it. On the contrary, considerations of utility may militate in favour of the return to the Grotian conception of the international community being not an association of *civitates*, but a community of *genus humanum*. Thus he pointed out that there may be a measure—though only a measure—of convenience in the abandonment of the orthodox practice which, by rendering the national State a necessary and exclusive party to proceedings arising out of an injury to an individual, tends to impart a political complexion to every attempt to vindicate his rights.

He uttered warnings against adopting the extreme of the opposite solution. For—and here he seems subsequently to have somewhat modified his attitude—‘it seems to be the case that the nature of international society, and in particular its vastness and heterogeneity, imposes, as a rule which

<sup>1</sup> ‘Fondement’, p. 548.

<sup>2</sup> *Ibid.*, p. 529.



it is nearly always convenient to adhere to, the practice that international law should touch the individual not directly, but only through the state to which he belongs'.<sup>1</sup> Yet, it is not certain that this manner of placing the emphasis represented his final conclusions on the matter. He had previously challenged, as being strained and artificial, the view that in espousing the cause of its nationals before an international jurisdiction the State actually defends its own right to insist on respect for international law in relation to the person of its nationals<sup>2</sup>—a view which is based on the assumption that the individual as such has no rights under international law. Eventually, notwithstanding his customary restraint, Brierly was prepared to go to the length of accepting and urging the view that the contrary is the case, and that upon final analysis it is only the individual who is a subject of international rights and duties.<sup>3</sup> This is so although as a rule States are the immediate members of international society. The subjects of law are the same in international and municipal law. 'These two systems of law differ, in fact, in their technique and their procedure, not in their essence. When we say that a rule of international law imposes an obligation upon a State, what we actually intend to say—unless we wish to utter an absurdity—is that although that obligation must, like any other, be performed in the last resort by one or more individuals, international law leaves it to municipal law to designate the individual or individuals in question.'<sup>4</sup>

*The unity of international and municipal law.*—It is in the light of this approach to these questions that Brierly arrived at the affirmation of the essential unity and identity of international and municipal law and the rejection of the then still predominant dualistic view. He deprecated the customary exaggerations of the absence of sanctions of international law and the laxity of its observance. He suggested that, in normal periods of peace, international law is probably more regularly observed than municipal law—though he admitted that the regularity of its observance stems largely from the fact that its obligations, being limited in scope, weigh only lightly upon Governments.<sup>5</sup> The difference between the two systems, he urged, lies not in the realm of principle but in that of organization. 'It is right that international lawyers should not blind themselves to the defects of the existing international order, but candour does not require of them to take refuge in a doctrine which makes of these defects a specific and paramount quality of that order.'<sup>6</sup> It is also for this reason that, after a restrained and critical analysis of actual practice,

<sup>1</sup> 'The Rule of Law in International Society', in *Acta Scandinavica Juris Gentium*, 7 (1936), p. 18.

<sup>2</sup> 'The Theory of Implied State Complicity in International Claims', in this *Year Book*, 9 (1928), pp. 42–49. And see, for a restatement of this view, 'Règles générales du droit de la paix' (hereinafter cited as 'Règles Générales'), in *Recueil des Cours*, 58 (1936) (iv), p. 45.

<sup>3</sup> *Ibid.*, p. 47.

<sup>5</sup> 'Fondement', p. 532.

<sup>4</sup> *Ibid.*, p. 40.

<sup>6</sup> *Ibid.*, p. 535.

he summed up as 'beneficial' the so-called doctrine of incorporation—namely, the doctrine according to which courts apply international law, *per se*, as being part of the law of the land. It is, in his view, beneficial not only as showing that municipal courts apply international law as authoritative in its own right, but also 'because by asserting that it is part of the law of the land we deny that it has any specific quality which distinguishes it from that law'.<sup>1</sup> The doctrine of incorporation has constituted one of the main contributions of the common law to international legal tradition. Its significance as such has occasionally been obscured by dicta on the part of judges when actually engaged in giving effect to it or by writers intent upon stressing the specific character of international law and its subjects and the fact that it is therefore incapable of forming *per se* part of municipal law—a purely doctrinal approach rendered even more theoretical by the almost general trend of modern constitutions declaring international law to be part of the law of the land.

*The independence and the sovereignty of States.*—Finally, the denial of any specific character of international law led Brierly, as it has led others, to an emphatic rejection of the validity, in the international sphere, of the notion of sovereignty as the supreme will not subordinated to any overriding legal obligation. Any such notion he conceived to be inconsistent with the very concept of international law. His criticism of the theory of self-limitation as an explanation of the source of international legal obligation was trenchant and unqualified.<sup>2</sup> He distinguished sovereignty, thus conceived, from independence, i.e. absence of dependence upon other States. That notion of independence he regarded as legitimate—though, like Westlake, he refused to believe that it is entitled to any quality of absoluteness. He denied, in particular, any 'natural right' to independence. To assert any such right would be to suggest that for an independent State to pass from the condition of independence to that of dependence necessarily involves a moral loss 'instead of a mere change of legal status to be judged according to the circumstances of the case'.<sup>3</sup> No moral loss accompanied the merger of the American States into the Union—an example not without significance for the possibilities of international integration.

It is also for that reason that he frequently availed himself of the opportunity of challenging the doctrine of fundamental rights which—being an expression of extreme individualism—treats as immutable the present status of independent sovereignties in international society.<sup>4</sup> It is for the same reason that, again closely following Westlake, he considered self-preservation to be not a right but an instinct which is liable to, and in need

<sup>1</sup> *The Law of Nations*, p. 90.

<sup>2</sup> 'Fondement', p. 483. See also below, p. 17, n. 6.

<sup>3</sup> *The Law of Nations*, p. 122.

<sup>4</sup> 'Fondement', p. 473.



of, regulation by law.<sup>1</sup> In its current absolute connotation as identical with irresponsible will, the international sovereignty of States was to him no less objectionable than the internal sovereignty—including that of the majority in the democratic State. To adhere to that notion of sovereignty was, in his view, to render inescapable the conclusion that 'international law is nothing but a delusion'.<sup>2</sup> He had no hesitation in criticizing, with his customary restraint, certain expressions of the Permanent Court of International Justice in the case of *The Lotus* which, when taken in isolation, were liable to be misunderstood as giving undue prominence to sovereign States as a source of law.<sup>3</sup> He looked forward to the time when these terms will become no more than an honorific epithet.<sup>4</sup> Neither did he limit his criticism of sovereignty to its express manifestations. Thus, inasmuch as it is clear that the extreme application of the doctrine of equality of States is no more than an offshoot of the claim to a fundamental right emanating from sovereignty, he rejected it in emphatic terms as being no more than 'a quite spurious application of a nominally democratic principle'<sup>5</sup> and as misleading, mischievous, and obstructive of progress.

At the same time, his capacity and his desire not to overstate his case and to give a complete picture of the problem involved caused him repeatedly to draw attention to the fact that the place which the doctrine of sovereignty held in the doctrine of international law was no mere aberration of logic. It was an expression of the overriding reality of the actual power wielded by States.<sup>6</sup> An analysis which ignored that factor was bound to be incomplete.

## II

In the preceding pages an attempt has been made to give an account of Briery's approach to the basic aspects of international law. It is now pro-

<sup>1</sup> *The Law of Nations*, p. 295.

<sup>2</sup> *Ibid.*, pp. 15, 16.

<sup>3</sup> 'Règles Générales', p. 147.

<sup>4</sup> The following passage from a paper read in 1945 may aptly be quoted in this connexion:

'Mais si nous voulons être les maîtres et non pas les esclaves des termes politiques que nous trouvons convenables d'user, alors nous pouvons au moins espérer qu'au fur et à mesure que le droit international exercera une influence progressivement plus forte dans les relations internationales, nous n'oublierons pas que, en appliquant l'épithète de souverain à un Etat, nous voudrions dire tout simplement qu'il s'agit d'un Etat indépendant, d'un Etat qui n'est pas subordonné à aucun autre, et rien que cela, et par là nous n'impliquerons absolument rien quant à sa position par rapport au droit international. En parlant des Etats comme souverains, comme je ne doute pas que nous continuerons à en parler, nous pourrions même parvenir à sentir et à nous rendre compte que ce terme n'est rien de plus qu'un épithète honorifique conventionnel, plus ou moins comme chez Homère Ulysse est toujours "rusé" et chez Virgile Énée est toujours "picux".' ('La doctrine de la souveraineté dans le droit international moderne', in *Academia das ciências de Lisboa*, 1945, pp. 24, 25.)

<sup>5</sup> *The Law of Nations*, p. 124.

<sup>6</sup> See, for example, 'International Law: Some Conditions of its Progress', in *International Affairs*, 22 (1946), p. 353, and the lucid comment on this aspect of the problem by Charles de Visscher *op. cit.*, p. 87.

posed to draw attention to what is perhaps the most characteristic—as it is the most persistent—feature of his teaching in this respect, namely, the use to which he put his emphasis upon the moral and spiritual content of the law. It is this feature which explains his repeated insistence on the inherent limitations of the range of international law. This feature, coupled with a high intellectual integrity, made him impatient of easy solutions which treat the law, or the mere formulation or formal acceptance of it, as a panacea. Law is to him an organic thing; it is no mere piece of machinery. The efforts of lawyers cannot create the ground for its full operation—though they can stimulate its growth once we have obtained clarity on the restricted scope of our endeavour. Such clarity—a theme which he developed in many a context—consists in the realization that law never creates order, but is its product.<sup>1</sup> Law depends on international organization; the more comprehensive that organization, the more fully will there be established the primary condition of the growth and of effectiveness of the law. It is largely—though not exclusively—for that reason that he was critical of exclusive reliance on the acceptance of international obligations of judicial and other methods of pacific settlement and on the mere formulation of the law. Considerations of that nature apparently weighed with him when he expressed scepticism concerning the current proposals to establish an International Criminal Court.<sup>2</sup> It is possible—perhaps probable—that his suspicion of imposed or ready-made solutions caused him to exaggerate, or misjudge, the importance of the question of priority in the relation of law and order. It would seem that he did not attach sufficient weight to the effect which the law, albeit extraneous and artificial in its inception, gradually exercises upon the habits and the thinking of society; that he did not give full scope to the possibility that law and order may be established *pari passu*; and, above all, that he may have failed to realize that order is in a large measure no more than a system of legal obligations for respecting and ensuring the respect for and observance of order. Moreover, as we shall see, in the course of the final development of his thought he came to realize the limitation of this approach to the problem and the necessity for its revision.

<sup>1</sup> See, in particular, *The Outlook for International Law* (1944), pp. 74 ff.; and in *International Affairs*, 22 (1946), p. 359.

<sup>2</sup> 'Do we need an International Criminal Court?', in this *Year Book*, 8 (1927), pp. 81–88. For the same reason he also expressed doubts as to any excess of confidence in the effectiveness of imposed solutions in the matter of settling international disputes. 'The truth is that government with the consent or at least with the acquiescence of the governed and in particular of those among the governed whom a measure particularly affects is not a mere ideal, but one of the basic conditions upon which the smooth and efficient working of modern government depends': 'The Essential Nature of International Disputes', in *Virginia Law Review*, 16 (1930), p. 543. He suggested that the true analogy lies rather in the field of settling disputes, especially of an economic nature, between powerful groups within the State, where the typical method is that of conciliation or of legislation aiming at balancing conflicting interests.



But there was one aspect of his emphasis upon the limitation of the scope of law to which Brierly devoted particular attention, which is a recurrent topic in practically every one of his major contributions, and which he apparently never abandoned. This is the view that having regard to the fact that the membership of the international community is distinctly limited in comparison with the multitude of individuals composing the national society, the content of international law must necessarily be restricted in the matter of general principles. Within the State the law governs large numbers of individuals possessing identical qualities; it can disregard the differences seeing that, on the whole, these are outweighed by similarities. In international society, where 'every State is unique', stress must be laid not on the qualities which they have in common, but on the qualities and interests which are particular to them.<sup>1</sup>

Brierly did not claim originality in propounding this theme. In particular, he often acknowledged his indebtedness in this respect to the writings of Professor Schindler.<sup>2</sup> He could have claimed earlier authority—that of Maitland<sup>3</sup>—in support of that view. However, he found a considerable following on the subject<sup>4</sup> and it may not be out of place to re-examine it critically. In the first instance, any mischief resulting from the inapplicability of general principles may be tempered by the application of specific rules and exceptions—a factor which constitutes an argument in favour of, not against, the elaboration of the law. The circumstance that such specific regulation is not easy of achievement and that it may require the consent of the interested States points to the difficulty of the task, not to its lacking urgency or justification. There may be a measure of deceptiveness and simplification in entrusting it to international tribunals—which possess no compulsory jurisdiction. Moreover, in so far as international tribunals may play a legitimate part in this connexion, they must—unless their task is to be one of regulation of interests or of outright judicial legislation—be assisted by general principles either already existing or specifically adopted. Thus, for instance, it is true that no international river—an example on which Brierly frequently relied—is the same. But, as he himself admitted,<sup>5</sup> there exist general principles of law not infrequently acted upon by international tribunals which in most cases may provide a satisfactory solution, such as the principle of prohibition of abuse of rights or of equitable

<sup>1</sup> 'The Rule of Law in International Society', in *Acta Scandinavica*, 7 (1936), pp. 9, 10; *Outlook*, pp. 40 ff.; 'Règles Générales', pp. 17, 18.

<sup>2</sup> *Recueil des Cours*, 46 (1933) (iv), p. 265.

<sup>3</sup> 'In my view the great difficulty in obtaining a body of international rules deserving the name of law lies in the extreme fewness of the "persons" subject to that law and the infrequency and restricted range of the arguable questions which arise between them' (Letter to Henry Sidgwick, 11 December 1888, printed in Fisher, *Frederic William Maitland* (1910), p. 48).

<sup>4</sup> See, for example, Charles de Visscher, *op. cit.*, pp. 171, 195.

<sup>5</sup> 'Règles Générales', p. 187.



apportionment of legitimate interests. It is a matter of machinery whether the application of these principles is entrusted to international courts or river commissions. Above all, in most spheres of international law<sup>1</sup>—such as diplomatic immunities, or the law of treaties—detailed regulation is feasible and desirable provided that existing divergences are not elevated to the rank of fundamental differences of national interest and outlook.

Neither is it easy to accept another of his reasons for the limitation of the place of legal regulation in the international sphere, namely, the alleged fact of the limited scope of contacts between States.<sup>2</sup> For, as he himself admitted, the international contacts of individuals have conspicuously tended to increase. Modern international law has been conspicuous for the manner in which these contacts have tended to be governed by general multilateral conventions concluded between Governments.<sup>3</sup>

However that may be, the frequent reliance on the argument of the 'fewness of the members of the international community' considerably influenced Brierly's views not only on the inherent limitations of the place of law in international society but also on particular questions such as that of the codification of international law. This was probably the main reason why, notwithstanding—or, perhaps, because of—direct personal experience in that sphere, he assigned but a narrow function to the work of codification. He was inclined to limit it to what is occasionally described as restatement of those parts of international law with regard to which there is general agreement and no actual divergence of practice. In so far as codification amounts to creating new law with the view either to meeting new conditions or reconciling actual and important conflicts of international interest, he was of the opinion that a task of that nature was more suitably within the province of Governments and politicians.<sup>4</sup> It is not necessary here to express an opinion upon the justification of that view. It stemmed largely from the conviction, already noted, of the limitations of legal regulation in the international sphere. But it sprang also from a discipline of thought and an integrity of method reluctant to sanction easy solutions and to confuse machinery for substance.<sup>5</sup>

<sup>1</sup> As shown, for instance, in the volumes of the Harvard Research on codification and the Report submitted in 1956 by Sir Gerald Fitzmaurice to the International Law Commission and embodying a detailed code on some aspects of the law of treaties.

<sup>2</sup> See, for instance, 'The Function of Law in International Relations', in *Problems of Peace* (1929), p. 284.

<sup>3</sup> See Jenks, 'The Scope of International Law', in this *Year Book*, 31 (1954), pp. 1-48.

<sup>4</sup> See, for example, 'The Future of Codification', in this *Year Book*, 12 (1930), pp. 1-12, especially at p. 8.

<sup>5</sup> In his article, written in 1948, on 'The Codification of International Law', in *Michigan Law Review*, 47 (1948), p. 4, he said:

'... We are tempted to think of codification as a cheap method of establishing international order, as something that lawyers could easily do for the world if only they could be brought to see how badly it needs doing. But that is a complete delusion. The responsibility cannot be

It was also this inclination to assign but a limited field to legal regulation which, coupled with his recognition of the moral basis of international law, explains the persistence, for a long time, of the theme of peaceful change in his writings. Law which is static tends not only to be inadequate; it must increasingly be lacking in moral content. That aspect of international relations was predominant in his mind when, in particular with regard to the problem of obligatory pacific settlement, he returned repeatedly to the dictum that 'law is not a panacea'. He had already given expression to these views in his inaugural lecture;<sup>1</sup> he did not modify them until the Second World War.<sup>2</sup> Occasionally he came near to finding, on that score, a justification of war as an instrument of change;<sup>3</sup> he found it difficult to concede without reservations the illegality of war, which, he thought, fulfils in the international sphere the same function as revolution within the State. Both aim at effecting changes which cannot be achieved within the limits and according to the forms of the law—the only difference being that whereas municipal law does not envisage the contingency of a revolution and does not regulate it in advance, international law possesses a system of rules governing the conduct of war.<sup>4</sup> He attached importance to reiterating that an international dispute is not necessarily 'settled' merely because it has received a legal *quietus*.<sup>5</sup> A survey of the literature of this and the following period shows the full extent of his influence in this respect.<sup>6</sup>

That over-emphasis of the question of peaceful change was probably an error of judgment on his part, and he realized and admitted it in the end. The antinomy of stability and change is an abiding problem of all law, both in the administration of justice and otherwise. For obvious reasons it may be particularly acute in the international sphere having regard to the absence of a legislature amending, with binding effect, the existing law. It does not follow that we are right in underestimating, on that account, the normal beneficence of the observance and the enforcement of law—especially if, at the same time, we proclaim the impracticability of alternative

shifted in this light-hearted way on to the shoulders of the lawyers. Lawyers can help; they can do the donkey work, but the responsibility belongs to all of us, and of course particularly to the leaders of our nations. For international law can only be codified if and so far as sovereign nations will agree among themselves on what the lawyers are to put into the code, and we have only too much evidence of the difficulty of getting agreements of that kind. The ambiguity of the word codification, its use to describe two processes which differ so widely both in their objects and in the techniques that they require, has had most unfortunate effects; it has disguised the real difficulties and induced men to think of codification as a means of international progress that can be adopted without any important concessions being made by our nations. It is something very different from that.'

<sup>1</sup> 'Shortcomings of International Law', in this *Year Book*, 5 (1924), p. 16; *ibid.*, 11 (1930), pp. 130–2 (in relation to the General Act of 1928); *ibid.*, 12 (1931), p. 134.

<sup>2</sup> See below, p. 13.

<sup>3</sup> 'International Law and Resort to Armed Force', in *Cambridge Law Journal*, 1932, p. 318.

<sup>4</sup> 'Règles Générales', pp. 117, 118.

<sup>5</sup> *The Law of Nations*, p. 202.

<sup>6</sup> See, once more, Charles de Visser, *op. cit.*, p. 411, and, in particular, the writings of Sir John Fischer Williams and E. H. Carr.



solutions such as the establishment of an international legislature decreeing any necessary changes of the *status quo*. This being so, it is not surprising that in the course of time Brierly came to revise his views on the subject. Writing in 1942 he pointed to past exaggerations of the problem of peaceful change. He recalled the fact that many wars—and, in particular, most wars in his lifetime—could not have been prevented by the existence of an international authority decreeing reasonable changes of the law.<sup>1</sup> These wars were not due to demands which could be related to any properly conceived problem of peaceful change and which could have been satisfied by offers made in accordance with reason or justice. Later on he elaborated this development of his thought in a separate chapter of *The Outlook for International Law*<sup>2</sup>—a chapter to which he apparently attached so much importance that he incorporated it in the last edition of *The Law of Nations*.<sup>3</sup> Eventually he went the full length in abandoning a point of view which, under his influence, had gained considerable currency. The relevant passage merits quotation: 'We are sometimes told that to put security first would be to stabilize the *status quo* and that that would be neither practicable nor just. I think there is more than one answer to that objection. For one thing, if we want to have law we shall have to recognize that it is by its nature a conservative force; we shall have to accept a bias, and a strong bias, in favour of the *status quo*. But for my part I would go farther than this and say that I think we have heard too much of the problem of peaceful change during the inter-war years.'<sup>4</sup> It is a measure of Brierly's intellectual integrity that he should have so fully and emphatically turned his back upon what seemed formerly to constitute one of the pillars of his creed.

Brierly's main contribution and influence lay in the field of philosophy of international law and its impact upon international relations. In his introductory textbook he could touch but lightly upon substantive questions of international law. Yet on those occasions on which he discussed in detail a particular question of international law, he showed, with valuable results, the qualities of his analytical mind. Thus there has been wide acceptance of his criticism of the traditional view that, in the field of State responsibility, the interest of the individual is fully merged in the formal interest of his State.<sup>5</sup> There was more than a suggestion of a shift of emphasis, on the question of termination of treaties on account of a change of circumstances, when he urged the analogy of the rule of English law on the subject, namely, that the contract is not dissolved by a change of cir-

<sup>1</sup> 'Law, Justice and War', in *Czechoslovak Year Book of International Law*, 1942, p. 19.

<sup>2</sup> (1944), Chapter viii.

<sup>3</sup> Fifth edition (1955), pp. 265–72.

<sup>4</sup> 'International Law: Some Conditions of its Progress', in *International Affairs*, 22 (1946), p. 358.

<sup>5</sup> See above, p. 6.

cumstances as such, however vital, but only by an implied term of the contract itself in the sense that it is to be dissolved when the event in question has occurred.<sup>1</sup> On the intractable problem of the validity of treaties imposed by force he contributed the valuable suggestion that it is preferable to regard instruments of that nature as legislative acts rather than compacts based on the consent of the parties.<sup>2</sup> His essay on 'Domestic Jurisdiction',<sup>3</sup> although bearing mainly on the Geneva Protocol for the Pacific Settlement of International Disputes, sheds instructive light on the subject. His article on 'The Nature of War Crimes Jurisdiction'<sup>4</sup> elucidated in a helpful manner the basis of the jurisdiction of municipal courts, as distinguished from that of international tribunals, to adjudicate upon war crimes. In particular, he pointed out that as the jurisdiction of municipal courts in the matter is grounded in the law of war, it need not take into account all the limitations of municipal law, operating in normal times of peace, such as the prohibition of retroactivity or the principle of territoriality, likely—in the circumstances—to defeat the ends of justice.

### III

There is one feature of Brierly's work which pertains to the domain of method rather than of substance, but which can nevertheless properly be regarded as being in the nature of a distinct contribution to the science of international law. That contribution lay not so much in the solutions which he propounded—for he often admitted, or implied, that there was no solution or no easy solution—as in the way in which he pointed to the difficulties involved and, after apparently propounding an answer to them, proceeded to develop the theme of the deceptiveness and the insufficiency of the answer thus given. It would almost appear that what weighed with him was not the result of the search, but the search itself; that he was content to be an exponent of difficulties and not a provider of solutions; and that it did not matter to him that in fact he left the problem unresolved. It is this intellectual integrity, which chooses the more arduous method and which is content with raising the question without aspiring to propound a clear-cut or a fully satisfying solution—where in all conscience none is believed to exist—which may well be among his most notable achievements. On occasions that tendency to hesitation, to inconclusiveness, and to piling qualifications upon qualifications may seem unsatisfying and perplexing. But there is at least room for the view that in the sphere of international law and international relations the appearance of complete solutions may be deceptive and confidence in them misplaced. This may not be a method

<sup>1</sup> 'Some Considerations on the Obsolescence of Treaties', in *Transactions of the Grotius Society*, 11 (1925), pp. 16, 17; see also, to the same effect, 'Règles Générales', p. 215. <sup>2</sup> *Ibid.*, p. 208.

<sup>3</sup> In this *Year Book*, 6 (1925), pp. 8–19.

<sup>4</sup> In *The Norseman*, 2 (1944), pp. 2–8.



which recommends itself to everyone, but it seems fair to say that international law has been enriched by the way in which Brierly pursued it.

He stressed the place of order as an essential prerequisite of and antecedent to law. But order implies, if necessary, coercion and the obligation to take part in coercion. Yet he insisted repeatedly that States being powerful groups cannot normally be coerced, and that the duty to participate in the coercing of an aggressor ought to be undertaken only if we are sure that, when the time comes, we shall be willing and that we shall be in a position to comply with that obligation. But of that, he urged, we cannot be sure. He himself was not certain whether, having regard to the fact that Governments are the trustees not of their consciences but of the transcending interests of their States, any such promises covering necessarily unforeseeable contingencies ought to be given at all. So while he conceded the importance of precise commitments as an element of international order, he doubted whether they ought to be made at the risk of uncertainty whether they will be honoured.<sup>1</sup> While he was prepared to counsel the acceptance at least of the precise obligation not to help an aggressor, we are not sure that he was willing to go to the length of the precise obligation to leave to an outside body the legal power to determine the aggressor. Yet eventually he was inclined to admit that the very interest of the State may require, in modern conditions, the adoption of the principle of the indivisibility of peace—which he questioned on occasions—and the consequent recognition of the deceptiveness of neutrality as a principle of policy. The latter was probably the view which, in the end, he was inclined—with hesitation, occasional oscillation, and qualifications<sup>2</sup>—to accept.

We have seen how, by degrees, Brierly came to relegate the problem of peaceful change from the central position which it originally occupied in his thought. He did not abandon it altogether, and deemed it incumbent upon him to examine the possibilities of machinery appropriate for that purpose.<sup>3</sup> But investigation suggested to him that specialized machinery—such as an equity tribunal or legislation brought about by an international authority—is neither necessary nor desirable and that the most promising approach is to provide avenues for organized influence by third States. However, upon further study, he doubted whether such influence can really be effective unless within the framework of collective security—as to which for a long time he entertained serious doubts.

<sup>1</sup> *Outlook*, p. 87.

<sup>2</sup> His exposition of the subject in *The Outlook for International Law* (1944), pp. 79–85, is no more than a marshalling of opposing arguments. See also, in the same vein, his paper on 'The Existence, Basis, Scope and Consequences of the Prohibition of War in International Law', in *Report of the International Law Conference* (1943), pp. 23–32. And see 'Law, Justice and Peace', in *Czechoslovak Year Book of International Law*, 1942, p. 20, for an unqualified expression of the view that 'force must be organised'—which consummation is hardly possible without specific, binding, obligations undertaken in advance.

<sup>3</sup> *Outlook*, pp. 131–40.



He felt it his duty to discuss the current proposals for a system of international protection of human rights through judicial supervision and otherwise. His conclusions seemed to be negative—largely owing to what he conceived to be insurmountable difficulties in the judicial interpretation and application of an international bill of rights.<sup>1</sup> But they were not altogether negative. For he proceeded to envisage a right of intervention in cases of gross inhumanity on the part of the State. However, he considered such intervention to be dependent upon the authorization of an international authority. Yet he viewed without enthusiasm the notion of an international authority proceeding by way of legally effective decision binding upon a dissenting State.

In the field of judicial settlement of disputes he considered the existing freedom of States to refuse to other States the benefit of adjudication based on law to be 'entirely indefensible'.<sup>2</sup> But he found some justification for it both in the absence of machinery of peaceful change and in the fact of the existence of vital interests of States. In view of this he seemed to lend his support to the method of the Optional Clause of the Statute of the International Court of Justice, based on the principle of compulsory jurisdiction with regard to expressly enumerated classes of disputes.<sup>3</sup> At the same time he doubted whether it would not be going too far to include in that enumeration disputes relating to customary international law as provided in the Statute of the Court. However, even if thus attenuated, the system of enumeration—under which Governments can reduce to conspicuously nominal proportions the scope of disputes thus specified—merely raises a new problem.

That tendency to conscientious qualification—bordering on indecision—exhibited itself not only in his approach to international organization. It went to the roots of his legal philosophy and of his treatment of specific questions of international law. In his discussion of natural law he considered that 'a rational universe, even if we cannot prove it to be fact, is a necessary postulate of thought and action'.<sup>4</sup> But on the preceding page he pointed to the exaggerations of the medieval conception of natural law in its belief in the rationality of the universe. To give an example in the field of detail, while in one place he asserted positively that international law does not require that immunity be extended to foreign public ships engaged in commerce,<sup>5</sup> he thought—in the same chapter—that the principle of complete jurisdictional immunity of foreign States is a workable and desirable rule of law.<sup>6</sup> There is not necessarily a contradiction between these statements. They are examples of scholarly circumspection—such as will be found, for instance, in his analysis of the Judgment of the Permanent Court

<sup>1</sup> *Outlook*, p. 117.

<sup>2</sup> *The Law of Nations*, p. 268.

<sup>3</sup> *Outlook*, p. 117.

<sup>4</sup> *The Law of Nations*, p. 21.

<sup>5</sup> *Ibid.*, p. 193.

<sup>6</sup> *Ibid.*, p. 211.

of International Justice in *The Lotus* case<sup>1</sup> and his reports to the Committee for Progressive Codification of International Law on Extradition and Territoriality of Jurisdiction. It is the same temper which made it possible for him to abandon or modify, whenever he felt impelled to do so in the light of experience or further reflection, some of the apparently rigid aspects of his teaching. Of this, his attitude to the problem of peaceful change and collective security and neutrality has already been noted. The same may be said of the readiness with which, after initial hesitation prompted by his preoccupation with peaceful change, he fully adopted the view of the completeness of international law<sup>2</sup> for the purpose of international judicial settlement and the absence of any element justifying, on that score, the distinction between justiciable and non-justiciable disputes—a distinction which, as in the end he had no hesitation in admitting, has often been no more than a device resorted to for explaining the claim of Governments to remain judges in their own cause.

Similarly, while he disdained any tendency to polemics—I have found in his writings no instance of his engaging in disparaging controversy with individual modern writers<sup>3</sup>—his exacting standards of rectitude caused him on occasions to express views of pronounced emphasis on what he considered attempts by Governments, in particular his own, to represent mere formulas as achievements or concessions of substance. Thus, after recounting the British reservations to the General Act for the Pacific Settlement of International Disputes, he observed: 'After this it seems almost indecent to dissect the absurd little mouse that has been born.'<sup>4</sup> There was a trenchancy, bordering upon impatience, in his criticism of what he considered the purely nominal advance achieved by the Charter of the United Nations as compared with the Covenant of the League of Nations.<sup>5</sup> Notwithstanding his deep faith in the International Court, he found no

<sup>1</sup> 'The "Lotus" Case', in *Law Quarterly Review*, 22 (1928), pp. 154-63.

<sup>2</sup> *The Law of Nations*, pp. 68, 69; 'Règles Générales', p. 74. The doctrine, which is believed to express accurately the legal position, of the completeness of international law (as, indeed, of all law) is occasionally—though without sufficient justification—interpreted as meaning that international law can settle satisfactorily every dispute and conflict. The possible injustice or inadequacy of the existing law is a legitimate subject of preoccupation by lawyers. From this point of view the admissibility of *non liquet* is not without attraction. See, for example, in connexion with the problem of *non liquet*, the valuable analysis by Professor Stone, *Legal Controls of International Conflict* (1954), pp. 153-64. However, it is doubtful whether any moral or political insufficiency of the existing law points conclusively to its incompleteness *qua* law in a manner calculated to affect the jurisdiction, validly accepted, of international tribunals.

<sup>3</sup> But see his outspoken criticism of the theories of auto-limitation in 'Fondement', pp. 483 ff. He used language of some pungency in relation to Hegel, whose influence upon international law he considered to have been most devastating; 'for even cynicism may be refuted by argument and observation of facts, but that is hardly possible in relation to mysticism' (at p. 510).

<sup>4</sup> In this *Year Book*, 12 (1931), p. 133. And see *ibid.*, 11 (1930), pp. 119-33, for his trenchant criticism of that instrument.

<sup>5</sup> *The Law of Nations*, pp. 281-7; 'The Covenant and the Charter' (Sidgwick Memorial Lecture, 1946).



reason for refraining from giving expression to surprise at the brevity of the Court's reasoning in the Advisory Opinion on the *Austro-German Customs Union*—an Opinion which, he suggested, gave the impression that as the result of a clerical error entire pages had been omitted in the crucial part of the Court's pronouncement.<sup>1</sup> However, as a rule, what appeared at first sight as a remark tinged with sarcasm, was no more than an outright statement of fact, such as the frequent observation that the normal observance of obligations of international law by Governments may be largely due to the fact that these obligations, being limited in scope and intensity, weigh but lightly upon States.<sup>2</sup> He was quick to correct occasional exaggerations, as when, after expressing—under the impact of the experience of the Second World War—strong doubts as to the prospects of the humanizing effects of the law of war, he proceeded to admit its importance.<sup>3</sup>

What, however, is perhaps most impressive in his contribution—and this seems to be a fitting theme on which to conclude this article—is that, amidst his restraint, his apparent inconclusiveness, his disillusionment born of the experience of a period of unprecedented retrogression, and his disapproval of easy solutions, there asserted itself a fervent and constructive hope. While he was sceptical of radical schemes of world government, of constraint and of rigid legal obligations, he went beyond mere negation and mere questioning. The solution, he taught, lies in evolving an international order based on collaboration, on institutions, on consent, on international administration, on—he would have said if he had been less averse to pretentiousness of expression—functional international government.<sup>4</sup> To these he pinned his faith. '... There is one solid ground for hope. ... We have begun to see ... that though the problem of world community remains essentially a moral problem, it is also in part a problem of statesmanship, and that international society needs institutions through which its members can learn to work together for common social ends.'<sup>5</sup> It was a faith rooted in a fundamental optimism—even if that optimism was no more than an assumption. For he knew, from experience and otherwise, that the fate of institutions depends upon the persons to whom they are entrusted and that, in the sphere of action, ideas may not be more potent than the individual human beings called upon to realize them. He believed, perhaps, that the transcending power of these ideas is bound, in turn, to enhance the very

<sup>1</sup> 'The Advisory Opinion of the Permanent Court of International Justice on the Customs Régime between Germany and Austria', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 3 (1933), p. 71.

<sup>2</sup> See, for example, 'Fondement', p. 532; this *Year Book*, 5 (1924), p. 5; *International Affairs*, 22 (1946), p. 353.

<sup>3</sup> 'The Law of War', in *The Background and Issues of the War*, by H. A. L. Fisher and others (1940), pp. 129, 132.

<sup>4</sup> See, in particular, *The Law of Nations*, pp. 45, 46.

<sup>5</sup> *The Law of Nations*, p. 45.

stature of the persons into whose charge they have been committed. There may be a moral duty to cherish some such hope. That optimism expressed itself also in his readiness to assume that, notwithstanding the principle of unanimity, international legislation is already a fact,<sup>1</sup> and, above all, that a fundamental identity of interests—and not a conflict between them—is the main underlying reality of international relations.<sup>2</sup>

As constructive hope born of travail of exacting search is, in the long run, of greater power than negation or confident assertion, there are good reasons for the belief that there is an even more convincing testimony to the importance and the permanence of his contribution than the fact that his introductory textbook has gone through more editions and has been translated into more languages than any other comparable work in this field. His was a luminous influence persuasive in its sanity and tolerance. He gave expression, in language of dignity and simplicity, to the perplexing and persistent problems of international law—not only of his own time but probably also of some considerable time to come.

<sup>1</sup> 'Règles Générales', pp. 97, 100.

<sup>2</sup> Ibid., pp. 231, 233.

# THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951-4: POINTS OF SUBSTANTIVE LAW. PART II<sup>1</sup>

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## I. TERRITORIAL SOVEREIGNTY. DISPUTED CLAIMS TO TERRITORY (THE CASE OF THE MINQUIERS AND THE ECRÉHOS)

### § I. THE 'CRITICAL DATE'

[NOTE—This section breaks some new ground, and the views put forward are tentative.]

#### (I) GENERAL ASPECTS

(a) *Definition.* The 'critical date' in relation to any dispute has been defined as the date after which the actions of the parties can no longer affect the issue.<sup>2</sup> Such a date must obviously exist in all litigated disputes, if only for the reason that it can never be later than the date on which legal proceedings are commenced. The actions of the parties after that date cannot affect their legal positions or rights as they then stood. In the case of disputed claims to territory the question of the critical date tends to assume special prominence, both because so much may turn on that date, and because the question of what it should be, may itself be one of the principal issues in the case. The point was put on behalf of the United Kingdom in the *Minquiers* case as follows:<sup>3</sup>

'... the theory of the critical date involves ... that, whatever was the position at the date

<sup>1</sup> The reader is referred to footnote 1 on p. 371 of the author's corresponding article in the previous issue of this *Year Book*, 31 (1954). In the cycle of studies on the work of the International Court during the period 31 March 1951 to 31 March 1954, the first article, in this *Year Book*, 30 (1953), dealt with the subject of General Principles. Last year's article on Points of Substantive Law, Part I, dealt with Maritime Law and Territorial Waters, with particular reference to the *Norwegian Fisheries* case. The present article completes the subject of Substantive Law under the two heads of (I) Territorial Sovereignty and Disputed Claims to Territory, with particular reference to the case of the *Minquiers and the Ecréhos*; and (II) Miscellaneous Points of Substantive Law.

<sup>2</sup> Cf. the article by Mr. D. H. N. Johnson on 'Acquisitive Prescription' in this *Year Book*, 27 (1950). Other possible definitions, derived from the United Kingdom argument in the case of the *Minquiers and the Ecréhos* (I.C.J. Pleadings and Oral Arguments in the case, vol. ii, pp. 48 and 61) might be:

'... the date by reference to which—or ... by reference to the legal and factual position existing at which—the merits of the parties' claims are to be determined';

'... the date on which the situation is deemed to have become crystallized';

'... the date [after which] the acts of the parties ... cannot alter the legal position so as either to improve or prejudice the claim of either party';

'... the date ... on the basis of the position [at which], as it [then] existed ... , the respective claims of the parties will ... have to be evaluated';

'... the date as at which the issue of sovereignty falls to be determined'.

<sup>3</sup> In the speech of the present writer—I.C.J. Pleadings in the case, vol. ii, p. 64.



determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them then had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now. And if both did—that is to say, if there was some sort of joint régime, or condominium, then that régime is still deemed to exist and to govern the rights of the Parties to-day. The whole point, the whole *raison d'être*, of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation that then existed. Whatever that situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.'

The importance of the point can be seen from two obvious examples. It is evident that where a country's claim to certain territory depends on proving the acquisition of title by prescriptive means of some kind, the later the critical date is put, the greater the chances of establishing title on that basis. *Per contra*, for the claim of the other party in such a case, based mainly on prior right of some kind, an earlier date may well be advantageous. In all those cases, therefore, where the critical date is not a more or less self-evident one, the question of its selection is bound to be a principal issue, since it will be the object of each side to secure the adoption of a date that will admit as much as possible of the facts telling in its own favour, while shutting out those that tell in favour of the other side.

(b) *Origin of the term.* Although the concept of the critical date has always been implicit in territorial disputes, its use as a term of art seems to be comparatively recent, and to have derived from the terminology employed by Judge Huber, the Arbitrator in the *Island of Palmas* case (1928),<sup>1</sup> where he more than once referred to the date of the Treaty of Paris of 10 December 1898 (under which Spain ceded certain territories to the United States), as being 'the critical moment',<sup>2</sup> and added:<sup>3</sup>

'... the question arises whether sovereignty ... existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.'

A little later (1933), the Permanent Court of International Justice in the *Eastern Greenland* case, after stating<sup>4</sup> that 'The date at which ... Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz. July 10th, 1931', went on to say:

'It must be borne in mind, however, that as the critical date is July 10th, 1931 ... it is sufficient [for Denmark] to establish a valid title in the period immediately preceding the occupation.'

These passages, besides indicating the *provenance* of the term, give some idea of the content of the idea of the critical date.

<sup>1</sup> *Reports of International Arbitral Awards*, vol. ii, p. 829; reported also in *American Journal of International Law*, 22 (1928), pp. 880 and 907.

<sup>2</sup> *R.I.A.A.*, vol. ii, pp. 843 and 866.

<sup>3</sup> *Ibid.*, p. 845; *A.J.*, vol. 22, p. 883.

<sup>4</sup> *P.C.I.J.*, Series A/B, No. 53, p. 45; *Hudson's World Court Reports*, vol. iii, p. 170.

(c) *Self-evident critical dates. The principle of the 'focus'.* Often, the choice of the critical date is obvious, because there figures in the case some treaty or event which, by 'focusing' the precise issues, must govern the legal position. In the *Island of Palmas* case, referred to above, the United States claimed as successor to Spain under a Treaty of Cession dated 10 December 1898 alleged to cover the island. On the basis *Nemo dare potest quod non habet*, it was manifest that the United States could only have a good title if, in 1898, Spain had a good title. The issue therefore was whether in 1898 Spain in fact had a good title, or whether at that date some other country, and in particular Holland—the other party to the dispute—had a good title. Similarly, in the *Eastern Greenland* case, there was no question but that, previous to 10 July 1931, when Norway issued a Proclamation announcing its occupation of Eastern Greenland, the disputed territory was either *res nullius*—and therefore open to such occupation—or already under Danish sovereignty. The date of this event therefore, the Norwegian Proclamation of 10 July 1931, was necessarily the date at which either Danish sovereignty existed—in which case the Norwegian Proclamation was invalid and void internationally—or at which it did not—in which case Norway was entitled, by employing the appropriate methods, to establish sovereignty over the territory. The *Clipperton Island* case<sup>1</sup> was another in which there was no issue as to what the critical date was. France had proclaimed her sovereignty in 1858 on the basis that the island was then *res nullius*. In 1897, Mexico sent an expedition to the island, and hoisted the Mexican flag there. The immediate and obvious issue therefore was whether, in 1897, Clipperton Island was French or not.<sup>2</sup> In certain other well-known cases of territorial claims, such as the *Delagoa Bay* case<sup>3</sup> and the *Walfisch Bay* arbitration,<sup>4</sup> the position has been the same, inasmuch as some date was obviously determinant.

## (2) SELECTION OF THE CRITICAL DATE WHEN NOT SELF-EVIDENT. DATE OF FOCUSING OF DISPUTE UNCERTAIN

(a) *Possible critical dates. 'Crystallization' of the dispute.* In the light of what has been said above, the case of the *Minquiers and the Ecréhos* heard

<sup>1</sup> Reported in *American Journal of International Law*, 26 (1932), p. 390.

<sup>2</sup> There was, however, a subordinate issue: whether, in 1858, when France established sovereignty on the basis that the island was then *res nullius*, it was so in fact. Mexico put forward a claim that it was then already Mexican by virtue of 'historic right'; but this claim was disallowed by the Arbitrator because of the absence of any evidence of actual possession by Mexico in or before 1858. There were thus, in this case, in a sense two critical dates, and this can easily happen (see further, subsection (2) (g) below).

<sup>3</sup> In the *Delagoa Bay* case (reported in *British and Foreign State Papers*, vol. 66 (1874-5), p. 554) the issue turned on the validity and effect of a cession of territory under a Treaty of 1823 made with native chiefs.

<sup>4</sup> In the *Walfisch Bay* case (*ibid.*, vol. 104 (1911), p. 50) the issue was the validity, as against one of the parties, of a unilateral frontier demarcation effected by the other party in 1888.



before the International Court in September–October 1953 is of great interest, as being one in which the question of what was the critical date at which the title of the parties to the disputed territory must be adjudged constituted one of the principal issues in the case—and this issue was adjudicated upon by the Court. In so doing, as will be seen presently, the Court may be thought to have attributed a slightly different meaning to the notion of the critical date from the normal one. This is not so actually, for in the relevant passage (see subsection (4) (b) below) the Court made it clear that it was speaking ‘in view of the special circumstances of this case’. However, strictly speaking, since the critical date involves that, once it has been chosen, the legal rights of the parties, and the question of sovereignty, are to be determined solely with reference to the situation as it stood at that date, it follows that the subsequent acts of the parties cannot affect the issue, and should therefore be excluded from consideration. In the particular circumstances of the *Minquiers* case, the Court thought that this depended on the character of the subsequent acts, and that—depending on this character—some of them would be admissible as evidence. It is clear that the concept of the critical date entails as a necessary consequence, in logic and law, that the acts of the parties after that date cannot create a *new* legal situation so as to affect the issue—for this would, in practice, merely be to move the critical date on to a later period. But although these acts cannot create a new legal situation, they may well be evidence in retrospect of what the legal situation *was* at the critical date, and hence of what are the parties’ legal rights now. This important point was made by Judge Huber in the *Palmas* case (see subsection (5) below), and it will be shown presently that it is in the same sense that the Court’s finding in the *Minquiers* case should be understood. Before considering this finding further, however, it is necessary to discuss what, in the absence of any obvious factor or event fixing the critical date, should be the theoretical criteria for determining it. The following are the main possibilities:

- (i) the date of the commencement of the dispute;
- (ii) the date (not necessarily the same as in (i)) when the challenging or plaintiff State first makes a definite claim to the territory;<sup>1</sup>
- (iii) the date, which again may or may not coincide with one of the foregoing, when the dispute ‘crystallized’<sup>2</sup> into a definite issue between the parties as to territorial sovereignty;

<sup>1</sup> Thus, in the *Minquiers* case, a dispute might be said to have started about the year 1870, when the French Government complained of the activities of Jersey fishermen on or near the disputed islets and rocks, as being contrary to an Anglo-French Fishery Convention of 1839. But France did not actually make a formal claim of French sovereignty over the islets and rocks until some ten to fifteen years later.

<sup>2</sup> This notion is defined later. It was employed for the first time in this context—so far as is known—in the United Kingdom oral argument in the *Minquiers* case.

- (iv) the date when one of the parties proposes and, so far as lies within its power, takes active steps to initiate a procedure for the settlement of the dispute, such as negotiations, conciliation, mediation, reference to, or use of, the machinery of an international organization, or other means falling short of arbitration or judicial settlement;
- (v) the date on which any of these procedures is actually resorted to and employed;
- (vi) the date on which, all else failing, the matter is proposed to be or is referred to arbitration or judicial settlement.

In order to determine which of these possibilities should prevail in any given case, it is necessary to consider the underlying object of the critical date, and the general principles which might govern its choice. In the *Minquiers* case these were stated on behalf of the United Kingdom as follows:<sup>1</sup>

'The fundamental object [*sc.* of the choice of critical date] is . . . to ensure that the dispute is determined on the basis that seems most just and equitable, having regard to all the circumstances of the case',

and again<sup>2</sup>

' . . . the conception of a critical date is intended to do justice to the real merits of each country's case, and for that reason it must not be put [*sc.* either] too early or too late.'

(b) '*Neither too early nor too late.*' The notion of '*crystallization*'. Developing these ideas, with reference to the considerations pertinent to the *Minquiers* case, Counsel for the United Kingdom continued as follows:<sup>3</sup>

' . . . generally speaking, that basis [*i.e.* of justice and equity] would be the position existing on the date on which the differences of opinion that have arisen between the Parties have crystallized into a concrete issue giving rise to a formal dispute. Most disputes are preceded by a period, which may be short or sometimes may be very long, according to the circumstances, in which there are diplomatic exchanges, protests, negotiations perhaps. Now, I suggest that this preliminary period does not give rise to a critical date—nor would it be equitable that it should—because the Parties have not taken up any final position. But, if the differences are not resolved, there eventually comes a moment when it can be said that a concrete issue in definite form has arisen. The Parties are no longer negotiating, or protesting, or attempting to persuade one another. They have taken up position, and are standing on their respective rights, and when that occurs, the claims of the Parties must obviously be adjudged according to the facts as they stand at that moment, neither earlier nor later.

'This moment, however—which is the critical one—is clearly not that at which the dispute was born—even when the dispute can be said to have had its birth at any definite moment, which is seldom the case: the critical moment is, normally, not the date when the dispute was born, but that on which it crystallized into a concrete issue.

'Taking the theory of the critical date a stage further, in the ordinary course of events and assuming that once a concrete issue has arisen between two countries, they decide

<sup>1</sup> *Per* the present author—see vol. ii of the I.C.J. Pleadings in the case, pp. 67–68.

<sup>2</sup> *Ibid.*, p. 69.

<sup>3</sup> *Ibid.*, pp. 68–69.



to settle it by international adjudication, the critical date would in principle be the date on which they agreed to submit the dispute to a tribunal. However, there may be cases where the critical date should nevertheless be some other date . . . one object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely joined, but when the party in question is rejecting or evading a settlement, for instance, refusing to go to arbitration. Because unless that were so, a party might reject a proposal for arbitration or other means of settlement, and then, after taking various steps to improve its position, it might then express willingness to go to arbitration, and in that type of case, it would obviously be most unfair to the other party, which had all along been willing to accept arbitration, to make the critical date the date of eventual submission to a tribunal. And probably, in such a case, the date ought to be that on which arbitration was first proposed. Of course all these cases must necessarily depend on their own circumstances.

‘So much for not putting the critical date too late. But equally, if not more important, is it not to put the critical date too *early*, thereby shutting out acts of the parties that were carried out at a time when each of them was perfectly entitled to take any legitimate steps in the assertion or prosecution of its claim. Just as putting the critical date too late may favour the party which has rejected an earlier proposal for adjudication, by enabling it in the meantime unilaterally to improve its position; so putting the critical date too early favours the party which has put forward a claim in a general way, but has not pursued it, or has only pursued it in a desultory or intermittent way, without attempting to bring the matter to a head, or to prosecute its claim by seeking international adjudication. To put the critical date too early would be to place a premium on the making of paper claims which the country concerned need not then follow up or insist upon, because it would be secure in the knowledge that the mere making of the claim would operate to freeze the legal position and to shut out or nullify the value of all subsequent acts of the other party.’

Counsel concluded by saying that he had ‘made these various observations about the theory of the critical date in order to show how important the choice of that date is, and what serious injustice may result if it is not selected’ with the most careful regard to all the factors involved’.<sup>1</sup>

(c) *The artificially created ‘critical date’*. Attention was also drawn in the *Minquiers* case to the dangers inherent in accepting certain types of claims to territory at their face value, and without reference to their inherent character. In one of the United Kingdom written pleadings<sup>2</sup> it was suggested that

‘. . . it cannot be open to a State artificially to create a “critical date” by the mere process of making claims which are only pressed up to a certain point, or which are subsequently abandoned, or revived only after a more or less prolonged interval—particularly where the claim is not accompanied by any proposal which would lead to a final settlement of the dispute (e.g. a reference to international adjudication). If it were open to States to create “critical dates” in this fashion, it would be possible for one State to keep alive indefinitely claims which it did not press to any final or definite issue, and, at the same time, to maintain that all the acts of user, administration, etc., carried out by the State in possession after the date of the original claim, had no evidential value and were . . . nullified.’

<sup>1</sup> I.C.J. Pleadings in the case, vol. ii, p. 69.

<sup>2</sup> Ibid., vol. i, pp. 551-2.

To this passage was appended<sup>1</sup> a footnote, the material parts of which read as follows:

' . . . territorial claims are not infrequently put forward for tactical or other ulterior reasons of some kind, and without any real expectation or intention of pressing them to a solution. The "nuisance value" of such claims would obviously be enormously increased if they at once gave rise to a "critical date" having a nullifying effect upon all evidence subsequent to that date.'

(*d*) *The question of the critical date is never a preliminary question. It is always bound up with the facts and merits of the dispute.* It is clear from the foregoing considerations that the balance may be a fine one in some cases, and that the issue may depend on the exact type of territorial claim involved, and on whether, in all the circumstances, the tribunal ought to look at the matter mainly from the point of view of the plaintiff, or of the defendant State, or not expressly from either point of view. The issue can therefore never be separated from the facts and merits of the case, and is indeed part of them. Moreover, on the basis of the same, or nearly the same, facts as regards the dealings of the parties with the territory concerned, the issue of the critical date may be vitally affected both by the general character of the dispute or claim, and by the behaviour of the parties in regard to it, quite apart from their operations on the ground, so to speak.

(*e*) *Application of the foregoing principles to the possibilities listed in subsection (a).*

*Possibility No. (i).* This is generally unsatisfactory for four reasons: *a.* the difficulty in most cases of determining what is in fact the actual or real date of the commencement of the dispute; *b.* the fact that a dispute about a given territory is not always, or does not always start as, a dispute about the sovereignty over it;<sup>2</sup> *c.* because, in the case of long-standing disputes, it would often lead to the exclusion of evidence and factors that are actually very relevant to the merits of the case;<sup>3</sup> and *d.* because of the premium it would tend to place on the creation or maintenance of territorial disputes for ulterior and political reasons—the 'nuisance value' claim.

*Possibility No. (ii).* This will frequently be open to the same objection as *d.* under No. (i). On the other hand, it may well be the genuine date of crystallization of the dispute (see under No. (iii) below), and to that extent acceptable. It is here that the question of the *conduct* of the parties, and

<sup>1</sup> I.C.J. Pleadings in the case, vol. i, p. 552.

<sup>2</sup> For an example, see above, p. 23, n. 1.

<sup>3</sup> The *Minquiers* case illustrates this also, for in a certain sense the dispute was centuries old, and could be said to date from the years 1202-4, when, *de facto*, the dukedom of Normandy became lost to the English Crown and was incorporated in the domains of the French Crown, or else from the date of the Treaty of Abbeville or Paris, 1259, by which Henry III of England renounced all claims to *continental* Normandy.



especially of the claimant State, in relation to the claim, becomes all-important. If a State puts forward a claim to territory which is *ex hypothesi* also claimed by another State,<sup>1</sup> and does everything in its power to prosecute that claim and to bring about a settlement or determination of it, by whatever means may be available; or alternatively is ready to accept the proposals of the other party to that end—such a State may well be in a position to contend that the date of its claim is the date as at which the question of sovereignty should be determined—(though not always necessarily, since other factors may be involved). But if a State makes a claim that is not pursued, or that is subsequently tacitly abandoned, no critical date can ensue from it, because no specific juridical effect is, ultimately, produced by such a claim. Alternatively, no dispute crystallizes. A State cannot, on the basis of a claim put forward, say fifty or sixty years before, but not since followed up in any way, purport to shut out the evidence of the intervening years, and require an adjudication of the claim on the basis of what has become an obsolete situation. It is the same if a State sets up a claim which it maintains in the abstract, but does not *pursue* in any practical way, i.e. does not press—for instance a claim made for reasons of prestige, propaganda, ideology or sentiment, the value of which may lie precisely in the fact that it is an unresolved claim; and which, for that reason, the claimant State may have no real interest in bringing to the point of a decision—or the judicial determination of which it has reason to fear, so that any steps to that end are not initiated, or are avoided. Such a claim may be kept up *on paper*, by diplomatic notes, speeches, declarations, &c., or by a technique of ‘pin-pricks’,<sup>2</sup> but it cannot generate a critical date.<sup>3</sup> Juridically, it is without effect on the legal situation; and even in the absence of any such motives as have just been described, this must

<sup>1</sup> *Ex hypothesi*, because if the position is that other States merely dispute the claim in the abstract (e.g. if one of their national companies wishes to operate in the territory, or their vessels wish to fish in its waters), but without those States themselves making any actual claim of sovereignty, the critical date will normally be the date of the event that led to the challenge—e.g. the date of the arrest of a foreign fishing vessel in local waters. Actually, if no other State claims title, the issue of sovereignty as such cannot in the last resort depend on a date earlier than that at which such a claim is eventually made, if that happens. Before that, what will be in issue will be the *legality* of the action (e.g. in relation to the foreign fishing vessel) that has been taken by the local State. That may, of course, turn on whether that State did in fact then possess sovereignty. But even if it did not, so that its action was illegal *at that time*, nevertheless so long as no other State claims sovereignty, it will always be open to the State having asserted title, to acquire it subsequently in fact, by taking the proper steps; or to convert a mere claim into actual title by such means.

<sup>2</sup> For instance, purporting to sign international conventions on behalf of the territory concerned; or issuing postage stamps purporting to show it as national territory; or purporting to ‘confer’ the national sovereignty on inhabitants of the territory, and treating them accordingly when on a visit to the claimant State, &c.

<sup>3</sup> If it could, the effect in many cases—and of course the object—would be to throw the issue back on to a basis of (more or less) ancient history, and to cut out the actual concrete exercise of sovereignty—particularly its recent exercise, which international tribunals have again and again stressed as being the determining factor (see generally below).



be the case with any claim that is merely set up but not pursued, or, if pursued, is not carried—or at least attempted to be carried—to the point of a settlement, by such means as are available.<sup>1</sup>

*Possibility No. (iii).* Of this it can be said that, in the absence of any other overriding factor, it will constitute the critical date. Such overriding factors may, of course, exist.<sup>2</sup> Moreover, the precise date when the dispute did crystallize may itself be a matter of dispute. In the type of case where one of the parties is fairly clearly in possession, it will *prima facie* be the date on which the other party makes a definite claim; but as has been seen under No. (ii) above, this will depend on the conduct of the claimant State in relation to its claim. In principle, however, once a dispute has in fact crystallized into a definite issue, there ensues a 'focus', and the merits of the case must turn on the situation as it then stands, for that is the situation to which the dispute relates and about which the parties are contending. They are not contending about an earlier state of affairs, as such, though that state of affairs may, and probably will, be relevant to the question of what the situation is when the dispute crystallizes. It may be precisely one party's case that an earlier state of fact had changed by the time the dispute crystallized, and that it is therefore as at the latter date that the rights of the parties must be adjudged. In the same way, once a dispute has crystallized on the basis of a given situation, and the parties are then contending about that particular situation, its nature cannot be affected by subsequent events. These may create a new situation in *fact*, they cannot create one in *law*, for they cannot alter what the situation *was* at the date of crystallization—although, as has been seen (subsection (2) (a) above), they may afford evidence of what it then was. This is fundamental to the whole conception of the critical date, for otherwise it would be open to parties to territorial disputes to acquire for themselves by subsequent action a title they did not possess when their original claim was challenged or disputed—though here again the conduct of the parties in relation to the claim must be taken into account.<sup>3</sup>

*Possibility No. (iv).* Of this it can be said that it will constitute the critical date in all cases in which no earlier date is clearly indicated. In effect, the

<sup>1</sup> This last point is of considerable importance today, for there has been a great change in the situation over the last half-century. Formerly, there were no pacific means by which a decision could be assured. This is still often the case. Nevertheless, the available means of recourse are much greater than they used to be. Reference may be made on this point to paragraph 230 of the United Kingdom Written Reply in the *Minquiers* case (I.C.J. Pleadings, vol. i, p. 554), and to the observations of Judge Levi Carneiro on the point, cited in this *Year Book*, 30 (1953), p. 44 (see *I.C.J.*, 1953, pp. 107–8, and below, p. 33, n. 1).

<sup>2</sup> For instance, although the dispute may have crystallized at a certain date, its merits may turn on some earlier event, such as a treaty.

<sup>3</sup> If this is as described under No. (ii) above, the effect will be either that the challenge must be regarded as lapsed, for want of prosecution, or that it has not caused a real crystallization of the dispute; or else that it cannot be held to have generated a critical date.

proposal of a means or method of settlement acts as a crystallization of the dispute if this has not already taken place.

*Possibility No. (v).* Clearly this must act as a critical date if no earlier one is indicated. The subsequent acts of the parties, after a method of settlement has actually been resorted to, cannot affect the issue, and this will probably remain the case even if the method resorted to (e.g. in the case of conciliation or mediation) does not in fact result in a settlement.

*Possibility No. (vi).* This, and more especially the date of actual reference to some form of adjudication, is ultimately the 'residual' critical date. Since the very question of the critical date assumes a legal determination of the parties' rights, and of the question of sovereignty, the date on which recourse is had to such determination must constitute the date as at which the issue is to be decided, if no earlier date appears to be indicated.

(f) *Conclusion on the question of conduct in relation to the critical date.* It will be evident from what has gone before that the conduct of the parties in relation to their claims is a highly material factor in determining the critical date, and, as will be seen, this was in effect also the view taken by the Court in the *Minquiers* case (see subsection (4) below). It would seem possible to generalize this position by means of the following propositions:

- (i) A State which propounds or contends for a particular date as being the critical date must be in a position to show that any disadvantage that would accrue to the other party from the selection of that date is not due to any fault, negligence or failure by the propounding State in prosecuting its claim, or to delay in reaching—or to avoidance of—a settlement on its part, aimed at improving its position or otherwise gaining an advantage in relation to the claim.<sup>1</sup>
- (ii) Conversely, a State which opposes the selection of a particular critical date must be in a position to show that the advantages that would accrue to it from the non-selection of the date, or from the selection of some other date, are not due to similar factors.
- (iii) In certain cases it may be that justice can only be done to the respective positions of the parties if a diverse critical date is selected, i.e. one date on the basis of which to determine the merits of one party's claim and another date on the basis of which to determine the other

<sup>1</sup> To take three obvious cases: (a) a State which rejects a proposal for arbitration, with a view to consolidating its position by further acts or encroachments, and which eventually accepts arbitration when it thinks its position has become strong enough, cannot claim that the later date should be regarded as the critical one; (b) a State which, not being in actual possession of, or exercising the administration over, a territory, makes a 'paper' claim to it, not accompanied or followed up by any proposal for or attempt at a settlement, cannot contend that the date of its claim is the critical date; (c) a State which protests against action by another State as being in derogation of, or an encroachment on, its sovereign rights, but does not, within whatever period the circumstances may indicate as being a reasonable one, take any further action in support or in preservation of its rights, cannot claim that the critical date should be placed at the moment of its original protest.



party's claim. Alternatively, if a single and common critical date is chosen, it may be right that it should shut out the subsequent acts of one party, but not of the other's. (This point is further discussed below—see subsections (4) and (5).)

(g) *Diverse and double critical dates.* The question of a *diverse* date (different dates for each party) has just been mentioned and is further discussed below (subsections (4) and (5)). A diverse date results if the application of the principles herein discussed to the same situation in a case leads to the establishment of two dates *for that situation* (one for each party). A double date, on the other hand, envisages two separate situations in the same case. For an example of a double date see footnote 2 on p. 22 above. This arises in the type of case where *A* has a good title as against *B*, but only has actual sovereignty if it also already had a good title as against *C* at a previous time—or in cases where territory has at one time been occupied or acquired, and then abandoned or given up, and subsequently re-occupied or re-acquired, by the same State or another. In these cases the principles here discussed apply to the determination of *each* of the dates concerned.

### (3) THE CRITICAL DATE CONSIDERED IN RELATION TO THE MAIN TYPES OF TERRITORIAL DISPUTE

Territorial disputes are of many kinds, but three may be distinguished as being in some sense basic. Most territorial issues that do not turn on acts of cession or annexation belong to, or are variations of, these three types, though some have elements belonging to more than one of the three:

(i) *Occupation: the issue is 'res nullius' or not.* The position here is that one of the parties maintains that a certain piece of territory, island, &c., is ownerless—*res nullius*—and therefore that sovereignty over it can be acquired and asserted by taking the proper steps prescribed by international law for that purpose—or else, that without any assertion of sovereignty, the nationals of the party concerned can make free use of the territory as a sort of *res communis*, e.g. for mining, quarrying, guano-collecting, fishing, &c., because it is *res nullius*. The other party maintains that the territory or island is not *res nullius*, but is already under its sovereignty.<sup>1</sup> In this type of case it is clear that the critical date must be that of the claim or event that raises the issue of *res nullius*. If one State claims sovereignty on the ground that, at the moment of the claim, the territory is *res nullius* (or if that is in fact the basis of the claim), and this is resisted by another State on the ground that the

<sup>1</sup> An outstanding example of this kind of case is the *Eastern Greenland* case (see above, p. 21, n. 4); but, in one form or another, it is quite a frequent type of case—see, for instance, the *Clipperton Island* case (above, p. 22, n. 1); the *Delagoa Bay* case (*British and Foreign State Papers*, vol. 66, p. 554); the *British Guiana Boundary* case (*ibid.*, vol. 99, p. 930); the *Walfisch Bay* case (*ibid.*, vol. 104, p. 50); the *Caroline Islands* case (*Moore's International Arbitrations*, 1898, p. 5043); and the *Bulama* case (*ibid.*, p. 1909).



territory had already been reduced into its own sovereignty, i.e. was not on that date *res nullius*, then the legal position falls to be adjudged as at the moment of the claim, for the issue is: was it at that moment a *res nullius* (which any State could appropriate by taking the prescribed steps), or did it then already belong to a given State, so that it was not open to appropriation by another? Similarly, if the State claiming already to possess sovereignty performs some act based on that claim, such as arresting a foreign fishing vessel in the waters of the territory or island, or making the carrying on of certain activities (e.g. prospecting, or guano-collecting) the subject of a licensing requirement, and the legality of these acts or requirements is challenged by other States on the ground that the sovereignty asserted is non-existent in law and that the territory is *res nullius* and therefore, pending any valid assertion of sovereignty, open to exploitation by all, the critical date must be the date of the event that raised this issue—(arrest of foreign fishing vessel, promulgation of licensing requirements)—for it is on the legal position existing at that moment that the validity of any such act or requirement will depend, and on which the issue will therefore turn.

(ii) *Acquisitive prescription: the issue is the validity of a claim based on 'prescription'*.<sup>1</sup> In this type of case there is no question of *res nullius*, and no doubt that one party was sovereign over the territory at a certain time. The question is whether it still is, or whether the other party has acquired a title to the territory by prescription, so that a change of sovereignty by operation of law has taken place.<sup>2</sup> The essence of a prescriptive claim (using that term in the acquisitive sense, and not in the sense of immemorial possession, as to which see rubric (iii) below) is that encroachments, or an adverse taking of possession, or jurisdictional acts that were in their inception illegal or invalid, have gradually operated to create title by a process of tacit acquiescence on the part of the original sovereign, amounting in the end to a tacit abandonment or surrender of its sovereignty.<sup>3</sup> In this type of case,

<sup>1</sup> In the article by Mr. D. H. N. Johnson cited in footnote 2 on p. 20 above, this type of prescription is called 'acquisitive' prescription, in order to show that it is a means of *acquiring* title, and to distinguish it from prescription in the ordinary sense, as the process of *extinction* of a right or title, or simple *possessio longi temporis*. This terminology serves a useful purpose, but should not obscure the fact that a *double* process is involved, having an active and a passive element; and that, in a sense, the passive aspect is the more important of the two. No amount of activity on the part of the 'prescribing' State would avail, without the passivity and inaction of the original sovereign. It is this, amounting in the end to tacit abandonment, surrender, or acquiescence, that constitutes the operative factor in the acquisition of a title by prescription (and see further n. 3 below).

<sup>2</sup> Examples of international arbitrations in which the issue turned on prescription are rather rare. The *Chamizal* case was one (reported in *American Journal of International Law*, 5 (1911), p. 782). There was also a considerable element of prescription in the *Island of Palmas* case. See also Johnson, *loc. cit.*, pp. 342-3, n. 3.

<sup>3</sup> This is not the place to embark on a discussion of the law relating to prescription, but the frequently reiterated statement that a title by prescription must be peaceful, and based (*inter alia*) on *peaceable* possession—a statement that will be found in many of the best authorities and in the pronouncements of international tribunals (see both cases cited in the preceding footnote)—

the question of the critical date tends to become confused with that of the legal validity of the acts claimed to have created the prescriptive title. A critical date may shut out subsequent acts from consideration altogether, but it does not confer any necessary *substantive* validity on the remaining acts which (being prior to that date) are not shut out. Such acts are eligible for consideration, but that very consideration may lead to the conclusion that they were invalid, and are legally null and void. Subject to this, the following principles would seem to govern the choice of the critical date in claims based on prescription:

(a) The critical date must not, if the claims of the parties are to be fairly adjudged, be set too early, or no prescriptive title could ever be acquired. The essence of the claim by prescription is the operation of a gradual process, and its alleged transition from the invalid to the valid, from legal nullity to eventual legal title. The evidence of this process must therefore be admitted before its effect can be judged at all.

(b) On the other hand, it is frequently the case with claims based on prescription that no formal claim to the territory is ever made by the 'prescribing' State, unless and until its position is challenged by the other party. The process being gradual, the prescribing State gradually or covertly assumes the position of sovereign and acts as such. Furthermore, the prescribing State may have an interest in avoiding bringing the matter to an issue. If, however, such a State does take the initiative in formulating a definitive claim, its validity is *prima facie* to be adjudged as at that moment, if no previous challenge by the other party has created an earlier critical date. A State which, at a certain moment, claims that it has sovereignty over a territory, cannot complain if its claim is adjudicated upon on the basis of the situation as it exists at that moment. Indeed, as such, the claim cannot be adjudged otherwise than on that basis. Subsequent acts may afford evidence of what that situation was, but they cannot alter it. Here the finding of the Court in the *Minquiers* case (see subsections (4) and (5) below) would be

though it may be in one sense correct, is nevertheless confusing and apt to be misleading. Prescription is a 'peaceful' process only in the sense that it does not involve the use of force as such, and does not constitute the acquisition of a title by *annexation*. It is a process of erosion and encroachment, rather than of prehension. But it is of the essence of the case that, in their *inception*, the acts concerned are *illegal*; any possession resulting from them is adverse and unlawful; and the whole process is contrary to the wishes of, and lacking in consent from, the real sovereign. The prescriptive title arises from the gradual change in the quality of these acts, or of this possession, produced by the combined effect of lapse of time and inaction or silence by the original sovereign. It is this last factor—tacit acquiescence amounting to a surrender of the title—that is the real and proximate cause of the change of sovereignty. Thus Verykios, a leading authority on the subject, in *La Prescription en droit international public* (1934), says (p. 75) that given 'l'exercice effectif, continu, et sans lacune de la souveraineté territoriale', it is 'Le silence du véritable souverain pendant un certain laps de temps assez long pour légitimer la possession du nouvel acquéreur' that transfers the title. Hyde's account of the prescriptive process is instructive and leads to a similar conclusion (see *International Law* (2nd revised edition, 1947), vol. i, § 116, pp. 386-7).



relevant—that subsequent acts taken specifically with a view to improving the position of the party concerned cannot be taken into account. Only if the other party had failed to react adequately to the claim, or to take such steps as were open to it to resist or challenge it, would this not be the case; for of course such failure, amounting in the long run to acquiescence, constitutes the complement and essence of the prescriptive process.

(c) As stated above, the prescripting State will in many cases not put forward any formal claim at all, and will simply go on acting, unless and until the other party calls a halt, so to speak. Such action by the other party would, of course, in any case, for the time being suspend or delay the prescriptive process, if not already complete. Whether it will generate a critical date must depend on circumstances. It will do so *prima facie*, because it will crystallize the dispute. If, however, it proves to be a mere paper protest, not pressed or followed up by such means as are available, it will not give rise to a critical date—for again, it is of the essence of the prescriptive process that *eventually* it cannot be prevented by action that stops at protests when other action is possible.<sup>1</sup> It is *ex hypothesi* an adverse process, and the whole question is whether it must be taken to have been tacitly accepted, willingly or unwillingly. In the last resort only two things can prevent it, physical reaction, or a proposal for settlement by reference to some international procedure, thus creating at once a critical date.<sup>2</sup>

<sup>1</sup> The question of the effect of protests in stopping (or not stopping) the prescriptive process is one of considerable difficulty—see the present author's remarks in this *Year Book*, 30 (1953), pp. 28-29 and 42-44; also the two articles by Mr. I. C. MacGibbon entitled 'Some Observations on the Part of Protest in International Law' and 'The Scope of Acquiescence in International Law', *ibid.*, p. 293, and 31 (1954), p. 143. Many authorities have assumed that diplomatic protests are enough to halt and prevent the prescriptive process. This is true up to a point. They are enough to *halt* it, at any rate in the first instance, and for a period of time. But can they *prevent* it in the long run, unless the position is that, having regard to all the circumstances of the case and applying reasonable standards, *no other course is, as a matter of practical politics, open to the State concerned*? It is very doubtful whether a State which, for instance, is in a position to compel arbitration or adjudication, can indefinitely retain its position on the basis of protests alone. Such conduct amounts in the end, indirectly, to tacit acquiescence. On the other hand, the protests of a State which makes, or has made, proposals for arbitration or adjudication that have been rejected or ignored, will retain their full value for a very long period. The subject was a good deal debated in the *Minquiers* case. The Court did not pronounce directly upon it, but in a separate Opinion one of the Judges (Judge Levi Carneiro) said (*I.C.J.*, 1953, p. 107): '... the French Government was satisfied to make a "paper" protest. Could it not have done anything else? It could ... and it ought to have ... proposed arbitration. ...' He went on (p. 108) to point out the objections 'if disputes were allowed to be prolonged indefinitely, without good reason, and if an attempt were not made to obtain the Court's decisive intervention but preference were given to mere periodical and ineffectual "paper" protests'.

<sup>2</sup> See the preceding footnote. It may be noticed that the party in physical possession is not in the same degree called upon to protest against a purported claim, except in the case of actual encroachments or violations of its sovereignty; and it can in large measure ignore mere 'paper' claims, or 'pin-prick' conduct (see under rubric (e) (ii) above) by the other party, without adverse effect on its title. It is the party *not* in possession, or which is in process of being gradually ousted from possession, that requires to protest and, in the long run, if its protests are to be effectual *in law*, to take some additional action, such as making a proposal for arbitration or for settlement by some other means. The point was argued in the *Minquiers* case but cannot be further discussed here.



(d) The general conclusion is that in cases of alleged title by prescription, the critical date tends to come late rather than early. This may seem as if it would work injustice to States that have not felt able, or have not wished, to resist encroachments by force, or by some form of retaliation, and have relied largely on a course of diplomatic protest, insufficient in itself, and in the last resort, to prevent the prescriptive process (see p. 33, nn. 1 and 2). At the present time, however, means are not lacking by which a State can procure an adjudication of such an issue—or by which even if it cannot compel one, it can place the other party in the position of rejecting proposals to that end, while continuing its encroachments. It is therefore always within the power of any State in this position to call a halt to the process as a matter of law, and to take steps which must automatically give rise to a critical date if the circumstances of the case do not point to any earlier date.<sup>1</sup>

(iii) *Claims 'longi temporis'. Ancient or immemorial right. The issue is the relative 'weight of claim' as between long-standing claims based on 'tradition' and on historical and other diverse factors.* In this type of case neither of the distinguishing features of the other two types is present. On the one hand, there is no point within the period relevant to the dispute at which the territory can be said with certainty to have been *res nullius* and owned by neither party. Consequently, there is no question of one of the parties having at some point acquired a title by occupation.<sup>2</sup> Equally, it is not clear that either party was (as against the other) definitely the sovereign at some point under an original title—so that, correspondingly, there is no question of the other party having subsequently acquired a title by prescriptive means.<sup>2</sup> In short, it is assumed as a *datum* that the territory has at all times been owned, and owned by one of the parties. The question is, which?<sup>3</sup> If this assumption is not made, there would then be two possibilities, either of which would bring the case within one of the other two classes. For instance, if one of the parties can be shown definitely to have been the sovereign at one time, then, if no cession or annexation has occurred, and no abandonment causing the territory to revert to the status of a *res nullius*, the other party can only have acquired sovereignty by prescription, and the issue is a

<sup>1</sup> As will normally be the case, for instance, if the prescripting State has itself at some point formulated a definite claim (see rubrics (a) and (b) above).

<sup>2</sup> It is of course rare to find a case that is wholly unmixed and presents no elements of another class, but the fact that neither party bases its claim on occupation or prescription as such, is certainly the distinguishing feature of this type of case.

<sup>3</sup> The *Minquiers* case was an example *par excellence* of this type. The same element has come into other cases also, if less exclusively—for instance, it was present in both the *Palmas* and *Eastern Greenland* cases; though the former was perhaps fundamentally a prescriptive case, and the latter one of occupation. The *Grisbadarna* arbitration (Scott, *Hague Court Reports*, 1916, p. 121) was also one in which the question of 'relative weight' played a large part. The *Island of Aves* case (Lapradelle & Politis, *Recueil des Arbitrages Internationaux*, vol. ii (1923), p. 404) may also be noticed as one in which issues of 'tradition' were raised.

prescriptive one. Alternatively, if the territory was, at some time within the material period, definitely *res nullius*, the issue will be whether one of the parties, and if so which, has *acquired* the sovereignty by the appropriate occupational methods, and whether, having done so, it has kept it up, or has lost it by abandonment or desuetude, or by the operation of a prescriptive process on the part of the other party. In the 'weight of claim' type of case, the issue tends to be not which party has acquired sovereignty by occupation and the exercise of sovereignty, or by prescriptive means, but which party has always had it, on the basis of the general character and weight of its claim. For this reason, such claims usually involve traditional or historical factors of considerable antiquity.<sup>1</sup> It is characteristic of this type of case that the issue may turn not so much on the intrinsic worth of the acts or claims of the parties, considered purely in themselves, as on their *relative* worth considered in competition with each other. Theoretically it is possible that neither side has obviously sufficient grounds of claim in the abstract, but that these grounds are less insufficient in the one case than in the other, and therefore can afford a basis for a finding of sovereignty.<sup>2</sup> Equally, it is possible (and indeed this is the likely case) that each side has grounds of claim that by themselves and taken in isolation would suffice to give it title, but one side has *better* grounds than the other. A *modus operandi* for determining such cases was suggested by Counsel for the United Kingdom<sup>3</sup> in the *Minquiers* case in the following passage. Speaking of the *Palmas* case, he said<sup>4</sup> that in order to obtain a 'true legal comparison of the respective titles as a whole'

'... Judge Huber followed a method which it would seem is the only feasible legal method. Instead of working purely chronologically, either forwards or backwards, he

<sup>1</sup> In an interesting article in the *Cambridge Law Journal* for November 1955, p. 215, entitled 'Consolidation as a Root of Title', Mr. D. H. N. Johnson has propounded the view that 'consolidation' may be a ground of title in a number of diverse cases having the common feature that the *original* ground or basis of title is suspect or dubious, either because it was adverse (acquisitive prescription) or because the exact origin is unknown (immemorial possession), but that by a process of continuous consolidation, involving the upkeep and maintenance of the claim, a good title is eventually built up. The 'relative weight of claim' type of case certainly tends to have the distinguishing marks of Mr. Johnson's consolidation basis, namely doubt as to the certainty or character of either party's root of title; immemorial possession claimed by one or even both sides; and finally, evidence of various acts or events claimed as showing that an alleged original title, however acquired, has never been lost, and has continuously been kept up (consolidation). The *Minquiers* case was an outstanding example of this type, and so also was the *Palmas* case, though the process there was more fundamentally a prescriptive one.

<sup>2</sup> So far as the International Court is concerned, it would be bound by Article 53, paragraph 2, of its Statute to find in favour of *neither* party, if it considered that neither had adequate grounds of title under international law—particularly as *it is only in the absence of any competing claim* that international tribunals have tended to hold that very little in the way of the concrete display and exercise of sovereignty is needed in order to give title. On the other hand, it would seem that an *ad hoc* tribunal would be bound, by the *compromis* submitting the dispute to it, to find in favour of one or the other party, unless *both* claims were *totally* without foundation.

<sup>3</sup> Sir Lionel Heald, Q.C., M.P., at that time Attorney-General.

<sup>4</sup> I.C.J. Pleadings in the case, vol. ii, p. 49.



studied and analyzed first the one title by itself, and the other by itself, then the first again, comparing the two titles, not in terms of the moment, but in respect of their legal weight, taken as a whole over the whole period.<sup>1</sup>

The Court itself in the *Minquiers* case described this type of issue as follows (*I.C.J.*, 1953, p. 53):

‘Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.’<sup>2</sup>

In determining this issue in the *Minquiers* case, the Court followed a precisely similar method to that of Judge Huber in the *Palmas* case, considering separately the grounds of title of each of the parties in respect of each group,<sup>3</sup> and then comparing them for relative weight. Thus, with reference to the Ecr  hos, for instance, the Court concluded (*ibid.*, p. 67):

‘The Court being now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered above, finds . . . &c.’

It is in fact clear, as regards the question of the critical date in cases of this kind, that their very nature requires that this date shall not be put too early, or most of the evidence on which the claims of both parties depend will be shut out. In the *Minquiers* case, the United Kingdom contended that the critical date ought in all the circumstances not to be put earlier than the latest possible date—i.e. that of the *compromis* submitting the matter to the Court—because the dispute did not really crystallize until then. This contention, as will be seen, did not entirely prevail; yet the practical effect of the view taken by the Court was very similar. It is the fact that in this type of claim the dispute tends, for one reason or another, not to crystallize for a long time. When it finally does, that should normally be regarded as the critical date, and any earlier date would probably prevent justice being done to claims the relative merits of which depend essentially on their general weight taking all the relevant factors into account over the whole

<sup>1</sup> Actually, the *Island of Palmas* case was not quite typical of the *genre* in the way the *Minquiers* case was. An original United States title based on discovery was found to be good at the time, but subsequently to have been lost by desuetude, and, at some point not precisely determined, to have been superseded by a Netherlands title based on what seems to have been a mixture of occupation and prescription.

<sup>2</sup> An attempt was also made on behalf of France to argue that the United Kingdom claim was based on a process of attempted prescription, carried out during the period 1839–1939. In reply, Counsel for the United Kingdom contended that the United Kingdom acts during that period, combined with the lack of adequate French reaction thereto, would have sufficed to confer a title by prescription, had it been necessary to invoke that basis of claim, but maintained that the United Kingdom title did not in fact rest on that basis, but on a root of ancient title coupled with continuous possession and display of sovereignty.

<sup>3</sup> Thus, in relation to the Ecr  hos group, the Court said (*I.C.J.*, 1953, p. 60): ‘The Court will now consider the claims of both parties to sovereignty over the Ecrehos and begins with the evidence produced by the United Kingdom Government.’



period. However, in the nature of these cases, it may not be easy to determine the real date of crystallization itself. With these preliminary observations, it can now be considered how the matter was decided in the *Minquiers* case.

#### (4) THE CRITICAL DATE IN THE *MINQUIERS* CASE

##### (a) *Arguments of the parties*

(i) It was contended on behalf of France that there was a self-evident critical date (see subsection (1) (e) above) resulting from an Anglo-French Fishery Convention of 1839, under which the parties had made certain arrangements for joint fishery rights in an area that included the waters of the Minquiers and Ecréhos groups. According to the French view, the effect of this Convention and of these arrangements was that henceforth neither country might assert any exclusive sovereignty over the groups. The contention was that the Convention 'froze' the position in the following sense: that whichever party was then sovereign went on being so, subject to an obligation to allow fishing by the nationals of the other; while whichever party was not sovereign, was precluded from subsequently acquiring sovereignty by any process of occupation or prescription, and any acts in that sense would be inconsistent with the Convention and null and void.<sup>1</sup> Therefore, according to this view, the issue of which party had the sovereignty in 1950 (when the matter was first brought before the Court) depended on which had it in 1839, and that was the critical date. Although the French Government unquestionably had reasonable grounds for putting forward this interpretation of the 1839 Convention,<sup>2</sup> it was obvious that the selection of the date of this Convention as the critical date would be very advantageous to the French case, for the effect would be to exclude from consideration all events occurring subsequent to 1839. As it happened, these provided strong evidence of possession and of exercise of sovereignty, on behalf of the United Kingdom, by the authorities of the island of Jersey, but of very little on the part of France.

(ii) The Court rejected the view that 1839 was the critical date, on the simple ground that the Convention on which this view depended did not have the effect suggested, that it dealt only with fishery rights in certain waters, and involved no implications as to the sovereignty over any of the islands in those waters.<sup>3</sup> There were then three other possible critical dates

<sup>1</sup> Or, as the French conclusions put it, 'the acts performed by each Party on the islets and rocks subsequently to August 2nd, 1839, are consequently not capable of being set up against the other Party as manifestations of territorial sovereignty . . .'

<sup>2</sup> It was no new suggestion, and had often been put forward by France in diplomatic correspondence over many years; but the British Government had never accepted, and had indeed always contested, this view of the effect of the Convention.

<sup>3</sup> In the light of the arguments of the parties, this view was based on the consideration that, since a sovereign over territory can always, by agreement, grant fishing rights in its waters to

in the case. The first was around 1869–75, when a dispute first crystallized, but this dispute was not directly on the issue of rival claims to *sovereignty*. Although questions of sovereignty came into the matter, the actual issue at that time was an alleged violation by Jersey fishermen, and by the Jersey authorities, of the fishery provisions of the 1839 Convention. The second possible date was the period 1886–8, when France first<sup>1</sup> made a formal claim of sovereignty over each of the groups in turn. The third was 1950, the date of the *compromis* submitting the matter to the Court. France contended that, failing 1839, the first of these dates (1869–75) was the appropriate one. The United Kingdom contended for the third, on the ground that there was no previous date at which the dispute about sovereignty could with certainty be said to have crystallized. For instance, in regard to the Ecréhos, although France had made a formal claim to sovereignty in 1888, no word further had been heard of the matter, in the sixty years that had elapsed between that date and after the end of the Second World War, during the whole of which period the group had continued to be administered by Jersey. Greater French activity had been displayed in regard to the Minquiers, but even there the claim of sovereignty had not been seriously pressed. It was only the occurrence of a number of local incidents between 1945 and 1950 that had caused a real crystallization of the issue of sovereignty. In these circumstances, it would not be right, merely on account of what seemed to be largely formal claims by France, to adopt a date that would exclude from consideration all events occurring between 1886–8 and the date of the *compromis*—for it was only by this instrument that the issues had been given a definite focus.

(b) *The finding of the Court.* The Court took the view that 1869–75 did not constitute the critical date, because no dispute about sovereignty existed at that time. It did not in terms reject 1950, the date of the *compromis*, but it found in effect that the dispute crystallized, not at that date, but at the period 1886–8. At the same time, the Court thought that this should not exclude consideration of the subsequent acts of the parties ‘unless . . . taken with a view to improving the legal position of the Party concerned’. This in practice had much the same effect as if the critical date had been set at 1950, since in fact, in this case, the post-crystallization acts of neither party could be said to have been performed expressly for the purpose of improving its position: indeed, the whole character of the dispute, and the nature of the parties’ claims, both of which were based on pleas of ancient

another country (and this has quite often occurred—see the cases cited in paragraph 76 of the United Kingdom Written Reply in the *Minquiers* case (I.C.J. Pleadings, vol. i, pp. 477–8)), an agreement providing for joint fishery rights in certain waters does not of itself imply any renunciation of sovereign rights, or of a claim of sovereignty.

<sup>1</sup> It was of course part of the whole French case that this claim was not really *new*; that French sovereignty over the groups had existed from time immemorial; and that a formal claim to it had only been rendered necessary by the attitude of the British Government.



right and immemorial title, would tend to exclude such a possibility. The full text of the Court's finding on the critical date issue was as follows (*I.C.J.*, 1953, pp. 59-60):

'The Parties have further discussed the question of the selection of a "critical date" for allowing evidence in the present case. The United Kingdom Government submits that, though the Parties have for a long time disagreed as to the sovereignty over the two groups, the dispute did not become "crystallized" before the conclusion of the Special Agreement of December 29th, 1950, and that therefore this date should be considered as the critical date, with the result that all acts before that date must be taken into consideration by the Court. The French Government, on the other hand, contends that the date of the Convention of 1839 should be selected as the critical date, and that all subsequent acts must be excluded from consideration.

'At the date of the Convention of 1839, no dispute as to the sovereignty over the Ecrehos and Minquiers groups had yet arisen. The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and the Minquiers. In such circumstances there is no reason why the conclusion of that Convention should have any effect on the question of allowing or ruling out evidence relating to sovereignty. A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and the Minquiers respectively. But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. In many respects activity in regard to these groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner. In such circumstances there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively.'

The Court was in fact very liberal in admitting to consideration the post-crystallization acts of the parties, and did not refuse all consideration of certain facts, adduced by the French Government,<sup>1</sup> arising even after the date of the submission of the dispute to the Court. This leads to the question in what exact sense post-critical date acts can properly be considered (as to which see subsection (5) below).

(c) *Conclusions resulting from the Court's finding.* These may be stated as follows:

(i) There is a critical date in territorial disputes as at which (or with reference to the situation existing at which) the question of sovereignty falls to be determined.

(ii) This date is *prima facie* the date at which the dispute on the issue of sovereignty 'crystallizes'.

(iii) The date of crystallization is itself *prima facie* the date at which the party not in possession of the territory makes a formal claim to it—(but

<sup>1</sup> See the reference to the proposed hydro-electric projects in the region of the Minquiers mentioned at the top of p. 71 of the Judgment.



it may equally be the date on which the party having, or claiming to have, title challenges the action of the party seeking to acquire it).

(iv) However, the conduct of the parties in relation to the claim is material to the question of what is the critical date. Therefore, it will not always follow that the critical date will be that which would otherwise result from principles (ii) and (iii).

(v) *Prima facie*, the establishment of a critical date excludes consideration of all acts and events subsequent to it (subject to the rule discussed in subsection (5) below).

(vi) In the 'special circumstances' of a given case, and more particularly where 'activity in regard to [the territory] had developed gradually long before the dispute as to sovereignty arose, and . . . has since continued without interruption and in a similar manner', there may be grounds for admitting consideration of post-critical date acts and events.

(vii) This may lead in practice to diverse critical dates, one for the evaluation of one party's claim, and the other for the other party's; and this will result from the fact that, in the circumstances, the acts of the one party subsequent to the critical date are to be regarded as eligible for consideration, but those of the other, not—(and see subsections (2) (f) and (g) above).

(d) *Evaluation of these findings. The 'improvement of position principle'*

(i) The Court's findings are of much interest and value as a guide on this intrinsically complex subject. They will provide a criterion which should enable the issue to be determined without difficulty in the great majority of cases. It will be seen from rubric (c) (vi) and (vii) above, that the Court only admitted with some caution, and a good deal of qualification, the idea that post-critical date acts and events could in certain circumstances rank for consideration. Furthermore, it is clear that the Court was contemplating the case where the previous long activity before the dispute as to sovereignty arose, was on the part of *both* parties, not merely one, and had been continued subsequently to the date of crystallization of the dispute 'without interruption *and in a similar manner*'. It is indeed highly probable that if the previous activity had been mainly on the part of one party only, the post-critical date acts of the other would not have been 'in a similar manner', but would be 'improvement of legal position' acts, and ruled out on that ground. An alternative formulation of the principle involved, leading to much the same result in practice, is that where the previous long activity, continued in a similar manner, has been on the part of one party only, then equally the subsequent acts of that party only can rank for consideration.

(ii) However, the improvement of position test, taken in itself, is not altogether an easy one to apply, and it will be noticed that the Court's enunciation of it was made subject to the general phrase 'in view of the

special circumstances of the present case'. Governments will in practice always strenuously maintain that their actions and measures are not taken in order to improve their legal position, and that they are in the normal exercise of an already existing or acquired sovereignty.<sup>1</sup> In some cases the facts themselves will cry out aloud against this interpretation of them, but in many cases it is one that will be difficult to disprove, even though it may plainly not be justified. Moreover, in many cases, particularly in the 'ancient right' type of case, it is probable that both parties are genuinely acting on the basis of what they *believe* to be their rights—in which case the practical effect of the doctrine, while setting the critical date in form at one moment, will be to relegate it in substance to another.

(iii) It would seem therefore that the test of 'non-improvement of legal position' is only likely to have a really practical effect in cases fundamentally of an attempt to acquire title by prescription, when it may be clear that the acts of one of the parties after the date when the dispute crystallized—say in consequence of a formal claim to the territory, or of a proposal for reference to arbitration—have been carried out in the prosecution of the prescriptive process, and with a view to strengthening the legal position of the prescribing party. But of course it may equally be the case that by the date of crystallization a genuine title by prescription has already been acquired, so that the subsequent acts of the party concerned would at least be admissible as evidence of that fact. This leads to a point of great importance, arising out of certain pronouncements by Judge Huber in the *Palmas* case.

#### (5) ADMISSIBILITY OF POST-CRITICAL DATE ACTS AND EVENTS AS EVIDENCE OF THE SITUATION AT THAT DATE

The foregoing considerations lead to the question whether the Court's finding in the *Minquiers* case on the subject of post-critical date acts should not be regarded as a special aspect of Judge Huber's pronouncement in the *Palmas* case as to the evidential (but not operative) effect of such acts.

(a) In the *Palmas* case Judge Huber, after having fixed 1898 as the critical date (see subsection (1) (c) above), said that in consequence

'The events falling between the Treaty of . . . 1898 and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place.'

But he then went on:

'They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding.'

On this basis, Judge Huber proceeded to admit the evidence of certain facts occurring after 1898. Commenting on this in the *Minquiers* case,

<sup>1</sup> This of course (*inter alia*) is why the Court's condition of adequate *previous* activity, and its continuation in a similar manner, is so important.



Counsel for the United Kingdom made the following remarks as to the application of the principle in question to the facts of that case:<sup>1</sup>

'The principle involved is analogous and very similar to "the principle of subsequent practice", to which I referred a moment ago in another connection. Just as the subsequent practice of parties to a treaty, in relation to it, cannot alter the meaning of the treaty, but may yet be evidence of what that meaning is, or of what the parties had in mind in concluding it, so equally events occurring after the critical date in a dispute about territory cannot operate to *alter* the position as it stood at the date, but may nevertheless be evidence of, and throw light on, what that position was.

'This principle is of great importance, we think, because normally sovereignty over territory is not something that springs up overnight. It is a continuing process. At any given moment it has probably been going on for some time. If the critical date in a given case is determined to be the year X, and a number of years after X you find one of the contestants exercising a sovereignty which has all the signs of stability and continuity, that in itself gives rise to a strong presumption that this sovereignty has existed for some time and existed at the critical date also.

'Applying these principles to the present case, we should contend that, even if the critical date were 1839 or 1880, the fact that, immediately subsequent to those dates, and right up to the present time, you find the United Kingdom in sole effective possession and invoking an ancient title and a long continuance of this possession; that all the normal manifestations of sovereignty during that period are carried out from the British side, and none from the French; that residents and property owners on the islands act as if they were on British, not French territory; that Jersey law alone is applied—these and many other factors create a virtually irresistible presumption that the islands were also British at the earlier dates.

'For these reasons, even if the Court should hold some date earlier than 1950 to be the critical date, we should contend that the later evidence cannot properly be excluded entirely and that it proves the existence of our title on the earlier date also, even if that title cannot be established by events occurring at or before that date, as Professor Wade, who will follow me, will show the Court that it can.'

A very striking application of this principle was given in the *Minquiers* case, in the separate Opinion of Judge Basdevant. In effect, he put the critical date at that of the Treaty of Brétigny, 1360. This Treaty provided that each country was to go on holding whatever islands it then held; but what these were was not specified, and in Judge Basdevant's view it was uncertain which party then held the Minquiers and the Ecréhos. In a remarkable judgment, all the subsequent facts and events, right up to 1950, were considered by Judge Basdevant solely from the standpoint of the *ex post facto* evidence they afforded as to what was the actual position in 1360. On that basis he concluded that the subsequent history showed that in 1360 the groups must have been held by England, and therefore the sovereignty was now vested in the United Kingdom because it had been or become so vested in 1360, the critical date in his view.<sup>2</sup>

<sup>1</sup> I.C.J. Pleadings in the case, vol. ii, pp. 94-95.

<sup>2</sup> See *I.C.J.*, 1953, pp. 76 ff. See also, for another aspect of this matter, with citations from Judge Basdevant's Opinion, this *Year Book*, 30 (1953), pp. 55-56.



(b) *Synthesis of these views.* In various ways, the doctrine propounded by Judge Huber in the *Palmas* case would seem to offer a more workable basis for dealing with post-critical date events than the 'non-improvement of legal position' basis propounded by the Court, some of the practical difficulties of which have already been noticed (see subsection (4) (d) above). Moreover, there is a certain theoretical objection to a process that must lead in effect *either* to the *real* critical date not being the formally determined one (because the subsequent acts of both parties are admitted as operative and not merely evidential); *or* to the adoption of diverse dates, and the determination of the parties' rights by reference to different dates. Strictly, the critical date means the determination not of two issues but of one: the sovereignty over a piece of territory at a given and definite moment. The question of sovereignty can, in fact, only be determined with reference to the position as at some given moment. Furthermore, nothing that happens subsequently can *change* the position as it then stood. The Court's finding can, however, perfectly well be combined and reconciled with Judge Huber's pronouncement in the following synthesis:

(i) There is one and only one critical date<sup>1</sup> as at which the question of sovereignty is to be determined.

(ii) The subsequent acts of the parties, or the post-critical date events, may be taken into account—not in order to change or affect the legal situation as it stood at that date but only as evidence of what that situation in fact then was—(Judge Huber in the *Palmas* case).

(iii) *Prima facie*, even that will only be possible where long activity on the part of *both* parties prior to the dispute about sovereignty, and its subsequent continuation by them 'in a similar manner', justifies looking beyond the critical date—or alternatively it will only be possible as regards that party whose conduct has satisfied these conditions—(the Court in the *Minquiers* case).

(iv) The subsequent acts of either of the parties, not done with a view to improvement of legal position, will to that extent, and depending on their intrinsic character and worth, be evidence of that party's sovereignty at the critical date. To the extent however that the acts are 'improvement of position' acts, they will not afford any such evidence, and may even afford evidence to the contrary—for instance, the party concerned would not have needed to be consciously improving its position subsequently, if it had really possessed sovereignty at the critical date—(synthesis of *Palmas* and *Minquiers* findings).

If these principles are valid, it follows that the Court's pronouncement in

<sup>1</sup> For any one 'situation', that is: but it has been seen (in subsection (2) (g) above) that the same case may comprise more than one situation, i.e. more than one moment as at which the sovereignty over the territory will have to be determined.

the *Minquiers* case (even related as it was to the 'special circumstances' of the case) is not to be read as meaning that when the post-critical date acts of the parties are eligible to be taken into consideration on the ground that they were not carried out by way of 'improvement of legal position', they can be admitted to consideration in such a way as to affect or change the legal position as it stood at the critical date<sup>1</sup>—for if that were the case, it would nullify the critical date, and cause it to be advanced to the date of the latest act of the parties so admitted; and what would ensue would be a determination of the legal position as to sovereignty at that later date. The true position is that if the post-critical date acts are of 'non-improvement' character, they will be evidence tending to show the existence of sovereignty at that date: and if not, not.

## § 2. CONSIDERATIONS GOVERNING THE DETERMINATION OF TITLE IN TERRITORIAL DISPUTES

### A. Introduction

(i) The present section, like the last, is based mainly on the case of the *Minquiers and the Ecréhos*, the facts of which were, in general, unusual. The case was, nevertheless, typical of the 'ancient right' type of claim described in § 1 (3) (iii) above, where the fundamental issue is not whether a territory that was once *res nullius* has been validly appropriated by occupation, or whether territory formerly under the sovereignty of one country has passed into that of another by a process of prescription,<sup>2</sup> but which of two rival claims or titles—both based on alleged ancient and immemorial right—have the greater weight. The issue arose in this form partly from the way the matter was put to the Court under the *compromis* submitting the case to adjudication;<sup>3</sup> but this was itself the consequence of the intrinsic character of the case. As already explained (see § 1 (3) (iii) above), the issue was dealt with by the Court on the same lines as those followed by Judge Huber in the *Island of Palmas* case, namely, by a separate examination of each side's basis of claim, and of the evidence in support of it, followed by a comparison of the relative weight and merit of the claims as thus revealed, and a determination in favour of one of them as being the better.

<sup>1</sup> In many cases, if such acts could change the legal position this would be precisely because they were acts by way of improvement of position, and therefore, according to the finding of the Court, inadmissible.

<sup>2</sup> However, both these elements came into the case as argued by the parties, since the groups of islands were mainly uninhabited; and also some part of the issue was whether, assuming them at some period to have been French, the United Kingdom had acquired a good title to them by prescription. The position is very succinctly put in paragraph 186 of the original United Kingdom Memorial in the case (I.C.J. Pleadings, vol. i, p. 103).

<sup>3</sup> The relevant passage read: 'The Court is requested to determine whether the sovereignty over the islets and rocks . . . of the Minquiers and Ecréhos groups respectively belongs to the United Kingdom or the French Republic.'



(ii) Although the facts of the case were unusual, and the Court's decision was necessarily based on those facts, it nevertheless contains a number of pronouncements and findings of general validity for the determination of territorial disputes. The facts themselves are of great interest, not only to the international lawyer but to the historian and the student of feudal law.<sup>1</sup> They cannot be fully gone into here for reasons of space, and because these studies of the Court's work are concerned with the general, not the particular; but the following points in explanation of the issues may be briefly mentioned.<sup>2</sup> Each side claimed an original title to the groups<sup>3</sup> based on ancient right—the United Kingdom on the fact that, since 1066, they had been 'held'<sup>4</sup> by the kings of England, at first in right of the Duchy of Normandy and later in right of the English Crown;<sup>5</sup> and France on the ground that the groups had always belonged to the French Crown by virtue of the feudal relationship between the kings of France and the dukes of Normandy, according to which the former were suzerains and overlords, and the latter vassals—in short, the French argument was that the Minquiers and the Ecréhos were part of Normandy, and Normandy was a fief of the French Crown.<sup>6</sup> The famous *arrêt* of the feudal Court of King

<sup>1</sup> One of the most important questions in the case, namely, which country was actually exercising the sovereignty over the Ecréhos group during the Middle Ages, turned largely on points of feudal law and tenure—see the argument of Professor E. C. S. Wade, of Cambridge University, before the Court (I.C.J. Pleadings, vol. ii, pp. 128-39, and 304-10).

<sup>2</sup> The pleadings, both written and oral, are rich in historical material based (so far as the United Kingdom is concerned) on the original researches of Mr. J. D. Lambert, O.B.E., assisted by Mr. J. C. H. le B. Croke, both of the Research Department of the Foreign Office. This material went back to the first days of the Norse invasions of Normandy. See also the very interesting controversy about the general nature of the feudal tie, developed in the speeches of Professor Wade and Professor André Gros (France), in vol. ii of the I.C.J. Pleadings, pp. 99-114, 205-11, 289-96, and 376-83.

<sup>3</sup> These, consisting each of a number of islets and numerous rocks, are situated roughly east (Ecréhos) and south (Minquiers) of Jersey, between Jersey and the French coast, in the great angle formed by the north Breton coast and the Cotentin peninsula.

<sup>4</sup> In what sense, and with what legal effect, was the subject of much controversy in the case.

<sup>5</sup> As Judge Basdevant pointed out, in a masterly analysis of the feudal position, the fact that the kings of England after the Conquest were also dukes of Normandy brought about no more than a personal union between the kingdom and the duchy, and they remained distinct political entities. 'Technically, the King of England held Normandy from the King of France as suzerain or feudal overlord. The Duke of Normandy, on the other hand, held England in his own right, as king. Speaking of Normandy, Judge Basdevant said (I.C.J., 1953, p. 74):

'A ce moment le roi d'Angleterre, comme tel, n'y a aucun droit: la conquête qu'en 1066 le duc de Normandie a faite de l'Angleterre et du titre de roi de ce pays n'a pu donner au roi d'Angleterre, comme tel, des titres sur les possessions du duc de Normandie. Les deux couronnes, l'une royale, l'autre ducal, sont sur la même tête, mais elles restent juridiquement distinctes: situation en parfaite harmonie avec l'état du droit de la période féodale. . . .'

<sup>6</sup> It was contended on the United Kingdom side that the feudal relationship between the Norman dukes and the French kings did not give the latter *sovereignty*, in the modern sense of the term, over Normandy. This view seems to have been shared by Judge Basdevant, who said (*ibid.*, p. 75):

'Cependant suzeraineté n'est pas souveraineté. Pour que la République française puisse utilement se prévaloir aujourd'hui du titre ancien du roi de France, il faudra que ce titre ancien se soit accru [i.e. should have been augmented into sovereignty] par la disparition, au dessus du roi de France, et à l'égard des îlots litigieux, du vassal, le duc de Normandie.'



Philip II of France in 1202 purported to deprive King John of England of his status and of all his rights as Duke of Normandy.<sup>1</sup> Philip was able to put this into effect by the physical conquest and annexation of *continental* Normandy, which henceforth passed into the direct sovereignty of the French Crown. But neither he nor his successors were able to gain possession of the Channel Islands, which thenceforward passed into—or, as the United Kingdom Government contended, remained<sup>2</sup> under—the sovereignty of the Crown of England, in its own right and not in right of the Duchy of Normandy.<sup>3</sup> The essential issue in the case was whether the Minquiers and the Ecréhos groups were part of the Channel Islands. It was not, nor could it be, contested on the French side, in the proceedings before the International Court, that the *main* Channel Islands were not or did not become English; but it was claimed that the Minquiers and the Ecréhos groups, which were nearer the French coast than the remaining Channel Islands, had not passed with them, and had so to speak gone, or remained, with continental Normandy. Apart therefore from certain general presumptions as to the *probable* situation of fact, affecting the sovereignty over the groups, which the parties sought to draw from the general historical position and from the principal treaties of the period,<sup>4</sup> the whole of the rest of the case was taken up with the evidence (derived partly from documents, partly from certain considerations of feudal law, but mainly from the facts) ranging from 1202 to 1950, tending to show which of the parties did actually hold the groups and act as sovereign over them. Each party was in a position to adduce various kinds of evidence in support of its case, at different points in the whole period, though the United Kingdom evidence was far weightier and more varied, particularly as to the more recent times. It was also the object of each party to show that the acts and events adduced by the other could be explained otherwise than as acts of sovereignty or events evidencing the existence of sovereignty.

### B. *Fundamental principles governing title to territory*

#### (1) THE DISPUTED TERRITORY MUST BE CAPABLE OF POSSESSION OR APPROPRIATION IN SOVEREIGNTY

It is a well-established rule of international law that territory, in order to be capable of appropriation in sovereignty, must be situated permanently

<sup>1</sup> The validity of this *arrêt* was impugnable on various grounds and has been doubted even in some French historical quarters. However, this issue became a secondary one in the case.

<sup>2</sup> It was contended on the United Kingdom side that, whatever the theoretical position under feudal law, the *de facto* situation in the Channel Islands since 1066 had been indistinguishable from an exercise of sovereignty by England.

<sup>3</sup> See above, p. 45, n. 5.

<sup>4</sup> These treaties coming at the end of various Anglo-French conflicts were those of Lambeth, 1217; Paris, 1259; Calais or Brétigny, 1360; and Troyes, 1420. For the kind of significance they had, see § 1 (5) (a) above, and subsection 10 (a) below.

above high-water mark, and not consist e.g. of a drying-rock, only uncovered at low tide, unless it is already within the territorial waters of appropriate territory.<sup>1</sup> In the Minquiers and Ecréhos groups there were a considerable number of such rocks. Therefore, in the *compromis* submitting the case to the Court, the parties had introduced a phrase requesting the Court to determine the question of sovereignty over the islets and rocks of the groups 'in so far as they are capable of appropriation'. The object of this phrase was to render it unnecessary for the parties to argue, or for the Court to determine, whether any particular islet or rock was or was not in fact capable of appropriation, as being permanently above high-water mark. The effect would be that the successful party would be declared sovereign over the groups as such, and this would extend to all the islets and rocks that fulfilled the required condition, but no actual determination of these would be necessary. It was, however, contended on behalf of France that this phrase meant not only that the islets and rocks must be physically capable of appropriation, but also that they must be juridically so; and this was related to the French contention (see § 1 (4) (i) above) that by the Fishery Convention of 1839 the parties had, as it were, precluded themselves from asserting any exclusive claim to sovereignty over the groups.<sup>2</sup> The United Kingdom contended in reply that this argument, even if otherwise well founded, involved a misconstruction of the relevant phrase in the *compromis*, because this phrase related to the character of the islets and rocks, not the capacities of the parties: the parties might or might not be incapacitated from appropriating the groups, but the islets and rocks situated above high-water mark (or within the territorial waters of an islet or rock so situated) clearly were capable in themselves of appropriation, and this was what the phrase in the *compromis* denoted. This view was endorsed by the Court, which said (*I.C.J.*, 1953, p. 53):

'These words must be considered as relating to islets and rocks which are physically capable of appropriation. The Court is requested to decide in general to which Party sovereignty over each group as a whole belongs, without determining in detail the facts relating to the particular units of which the groups consist.'

By this finding, the Court also implicitly endorsed the rule that certain kinds of territory are not capable of appropriation in sovereignty at all. The usual case is that of the island, rock, bank or shoal only uncovered at low tide. However, this case may have been rendered less simple in its

<sup>1</sup> See Articles 10 and 11 of the International Law Commission's final draft Code on the Law of the Sea (1956).

<sup>2</sup> This argument was not ultimately pressed, because of its obvious inconsistency with France's own claim to sovereignty over the groups. Taken literally it would have meant that under the *compromis* the Court could not have declared either country sovereign over any of the disputed territory at all, and it was clear that the parties had not submitted the matter to the Court in order to reach that result.



application than formerly, by reason of the modern doctrine of the continental shelf. If territory is claimed *as* continental shelf, the mere fact that it is submerged is irrelevant to the claim, the validity of which will depend on other factors (and in any event no territorial waters will be generated); but if the territory is claimed as land and not as sea bed, then the question of submergence remains fully relevant. There may, of course, be other kinds of territory not physically capable of appropriation in sovereignty,<sup>1</sup> but it is quite clear that the mere fact that territory is uninhabited, or even uninhabitable on a normal basis, does not render it legally incapable of appropriation.<sup>2</sup>

(2) PURELY PRESUMPTIVE EVIDENCE OF TITLE TENDS TO BE INSUFFICIENT  
*PER SE*

Both sides in the *Minquiers* case relied considerably on the force of presumptions as tending to establish the existence of a state of affairs that could not be directly proved. Indeed, it could be said that the whole French case rested on a presumption, namely, the allegation that France, deriving an original title from the fact that Normandy was a fief of the French Crown, and Normandy having become forfeited to the French Crown by the *arrêt* of the feudal Court of the French king in 1202, it must be assumed that France had remained and still was sovereign over all parts of Normandy, except to the extent that the United Kingdom could prove that some part of it had remained in, or passed into, English hands. Such a position could be established in respect of the main Channel Islands, but (according to the French contention) not in respect of the Minquiers and the Ecréhos groups, which must accordingly be deemed to be French.<sup>3</sup> On this basis, the French Government maintained in effect that it was unnecessary for them to show any specific exercise of *administration* by France in respect of the groups, since this could be assumed from their geographical character and close proximity to the French coast. The United Kingdom set up the counter-presumption that Normandy and the Islands having unquestionably been held by the kings of England since 1066 (even if as dukes of Normandy), it must be assumed that they

<sup>1</sup> For a discussion of the unsettled question of ice-shelves and frozen sea, see the article by Professor C. H. M. Waldock on 'Disputed Sovereignty in the Falkland Islands Dependencies' in this *Year Book*, 25 (1948), at pp. 317-18.

<sup>2</sup> For the authority in support of this proposition see Waldock, *loc. cit.*, at pp. 314-17. The mere existence of the continental shelf doctrine also supports it, although it may still be a question whether what is exercised over the continental shelf is sovereignty in the full sense, or 'jurisdiction and control'.

<sup>3</sup> The French case, theoretically a strong one, was much weakened by the position regarding the Chausey Islands, another group near the Minquiers but a little closer to the French coast. It was not contested on the United Kingdom side that the Chausey were French, but this was precisely because in respect of this group France could show actual possession, and the carrying out of all those acts of administration and control that were for the most part lacking, so far as France was concerned, in respect of the Minquiers and the Ecréhos.



remained so, except to the extent that France could prove that they had actually been taken possession of by the French Crown. This could be shown as regards continental Normandy, but not as regards the Islands, except, eventually, in respect of the group known as the Chausey.<sup>1</sup> It was further contended that the Channel Islands must be regarded as a self-contained entity, and that some of them—namely, the main Islands—being known to have remained or become English, all must be assumed to have done so too, unless the contrary could be established, as, in the case of the Chausey, it could. Other presumptions of different kinds were put forward on both sides. The Court, however, while taking these arguments into account, refused to found itself on any presumption, or at any rate to regard any presumption as conclusive.<sup>2</sup> It came near to doing so in one passage, where, after referring to the United Kingdom contention that ‘the Channel Islands in the Middle Ages were considered as an entity, physically distinct from continental Normandy, and that any failure to mention by name any particular island in any relevant document, while enumerating other Channel islands, does not imply that any such island lay outside this entity’, the Court continued (*I.C.J.*, 1953, p. 55):

‘Having regard to the above mentioned documents . . . and in view of the undisputed fact that the whole of Normandy including all the Channel Islands, was held by the English King in his capacity as Duke of Normandy from 1066 until 1204, there appears to be a strong presumption in favour of this British view.’

However, the Court went on (*ibid.*):

‘The Court does not, however, feel that it can draw from these considerations alone any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers, *since this question must ultimately depend on the evidence which relates directly to the possession of these groups*’—(italics added).

Again, in a later passage (p. 57), the Court said:

‘What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.’

### (3) NECESSITY FOR THE CONCRETE EXERCISE OF ‘STATE FUNCTIONS’ IN ORDER TO GIVE TITLE TO TERRITORY

(a) This results from the passages just cited, but may also be illustrated by reference to the exact terms in which the Court found that the United Kingdom had sovereignty over the groups, and that France did not have it.

<sup>1</sup> See the immediately preceding footnote.

<sup>2</sup> A similar view was taken by Judge Huber in the *Palmas* case (see the report in *American Journal of International Law*, 22 (1928), p. 904): ‘The admission of the existence of sovereignty [at two given periods] . . . would not lead . . . to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime . . . no presumption of this kind is to be applied in international arbitrations. . . .’

As regards the Ecréhos group, which was considered first, the Court, after a careful review of the concrete facts adduced by both sides as evidence of possession during the Middle Ages and subsequently, and also during more recent times, concluded (*I.C.J.* 1953, p. 67):

'The Court, being now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered above, finds that the Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Islands which were held by the English King, and that the group continued to be under the dominion of that King, who in the beginning of the fourteenth century exercised jurisdiction in respect thereof. The Court further finds that British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group. The French Government, on the other hand, has not produced evidence showing that it has any valid title to the group. In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom.'

Similarly, as regards the Minquiers, the Court said (p. 70):

'The evidence thus produced by the United Kingdom Government shows in the opinion of the Court that the Minquiers in the beginning of the seventeenth century were treated as a part of the fief of Noirmont in Jersey, and that British authorities during a considerable part of the nineteenth century and in the twentieth century have exercised State functions in respect of this group.'

As regards the French claim to the Minquiers, the Court said (p. 71):

'The Court does not find that the facts, invoked by the French Government, are sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned acts from the nineteenth and twentieth centuries in particular, including the buoying outside the reefs of the group, such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.'

Having thus compared the concrete evidence in support of both claims, the Court concluded (p. 72):

'In such circumstances, and having regard to the view expressed above with regard to the evidence produced by the United Kingdom Government, the Court is of opinion that the sovereignty over the Minquiers belongs to the United Kingdom.'

(b) *The exercise of 'State functions'*. The use of this term, as also that of 'a manifestation of State authority', in the foregoing passages, is of considerable interest as showing that the Court took the same basic view of what was required as its predecessor, the Permanent Court of International Justice, did in the *Eastern Greenland* case, and Judge Huber in the *Island of Palmas* case; and that in the passages cited under subsection (2) above, the term 'possession' must be read as meaning possession in sovereignty rather than, necessarily, physical occupation. In the article already referred to (see p. 48, n. 1, above), Professor Waldock has pointed out (*loc. cit.*,



p. 317) that there has been a certain change in legal thinking on this subject:

'The emphasis has shifted from the taking of physical possession of the land and the exclusion of others to the manifestation and exercise of the functions of government over the territory. This change is a natural consequence of the recognition that in modern international law occupation is the acquisition of sovereignty rather than of property. It follows perhaps even more from the recognition that sovereignty entails international duties as well as rights. Occupation is not only the assumption of the exclusive right to display state activities in the territory. It is also the assumption of a duty to protect within the territory the rights of other states both in regard to their security and in regard to the treatment of their nationals in the territory. The cases make it plain that to-day the decisive test of the effectiveness of an occupation is whether the claimant has in fact displayed state functions in regard to the territory sufficiently to assure to other states "the minimum of protection of which international law is the guardian".<sup>1</sup> Accordingly it is effective activity by the state either internally within the territory or externally in relations with other states which is the foundation of a title by occupation, not settlement and exploitation.'<sup>2</sup>

This does not mean that there may not be considerable variations in the degree of display of 'State activity'<sup>3</sup> required in different cases to support a title to territory, and, as Professor Waldock himself says in a later passage (*loc. cit.*, p. 336), the principal authorities are 'agreed in holding that the degree of State activity required to confer a valid title varies with the circumstances of each territory'. There must, however, remain considerable doubt whether a *total* absence of physical occupation can be reconciled with a claim of sovereignty over a territory, except in those cases where the character of the territory or other special circumstances connected with it can reasonably account for such a situation.<sup>4</sup> Professor Waldock's article was concerned mostly with uninhabitable regions; and the Minquiers and Ecréhos groups, though for different reasons, could also in a sense be regarded as coming within that category.<sup>5</sup> There can be no doubt that in the case of territory of this kind, physical occupation is not a necessary

<sup>1</sup> *Island of Palmas* award (*American Journal of International Law*, 22 (1928), p. 876).

<sup>2</sup> Professor Waldock points out: 'The word "occupation" itself is . . . a legal term of art; it is the Latin *occupatio* meaning appropriation, not occupation in its sense of "settling on". To-day it means, in international law, the appropriation of sovereignty, not of soil.'

<sup>3</sup> The term used by the Permanent Court in the *Eastern Greenland* case.

<sup>4</sup> Arctic or desert regions constitute the obvious case—or rocky islets devoid of natural vegetation. But it is not inconceivable today that a State, while fully exercising its sovereignty over some island, might wish to keep it uninhabited because of danger to life resulting from experiments carried out at sea, or for other good cause.

<sup>5</sup> The groups were not uninhabitable in the same sort of way as arctic territories, due to climatic conditions; but, having no natural fresh water supply or vegetation, they were not viable in themselves, and required to be supplied from the mainland or from Jersey. There were houses on them which were occupied in the summer months. The Ecréhos had at times been lived on without interruption. Thus, in the Middle Ages, a Priory which played a prominent part in the case had stood there for over three centuries, and the monks had maintained a light for the benefit of shipping. Between 1850 and 1895, Philippe Pinel, a Jersey fisherman, and his wife resided continuously on Blanc Ile of the Ecréhos.



ingredient of title and that, as Professor Waldock says (*ibid.*), it is enough to display 'the functions of a State in a manner corresponding to the circumstances of the territory', provided the State concerned 'assumes the responsibility to exercise local administration, and does so in fact *as and when occasion demands*' (*italics in original*). This leads to the question: what are the exercises of State functions, or display of State activity or authority, normally to be looked for? This matter also was pronounced upon by the Court in the *Minquiers* case.

#### (4) SPECIAL IMPORTANCE AS EVIDENCE IN SUPPORT OF A CLAIM TO SOVEREIGNTY ATTACHES TO CERTAIN TYPES OF STATE ACTIVITY OR EXERCISES OF STATE FUNCTIONS<sup>1</sup>

No acts are wholly devoid of probative value, except such as are clearly not performed *à titre de souverain*, or are capable of being accounted for

<sup>1</sup> The acts referred to in this subsection were comparatively modern. It is not possible within the compass of the present article to consider the interesting evidence relating to the possession of the groups at earlier dates subsequent to 1202. It may be mentioned, however, that two facts mainly governed the position regarding the Ecréhos. The first was that in 1200 (i.e. before the *arrêt* of the Court of Philip II of France—see rubric A (ii) above), King John of England, as Duke of Normandy, had granted the fief of the Channel Islands to one of his barons, Piers des Préaux, and the latter in 1203 had granted the Ecréhos (as being part of his fief, as the Court found—see Judgment, p. 60), on a basis of sub-infeudation, to the Abbey of Val-Richer on the mainland of Normandy. The French contention was that the grant, being in 'frankalmoin' (or free alms), did not set up a 'tenure', and therefore it severed the feudal link between the Ecréhos and the Channel Islands by, in effect, constituting an outright conveyance to Val-Richer. Consequently, when the French king took actual possession of continental Normandy in 1204, the Ecréhos passed with Val-Richer into his direct sovereignty. This contention, which proved to be a major feature of the case, was not upheld by the Court, which regarded the Ecréhos as having remained part of the fief of the Channel Islands, and therefore as having clearly been in English possession for as long, at any rate, as the three centuries or more during which the priory was maintained there.

The second main fact was the *Quo Warranto* proceedings of 1309. The following passage from the Judgment (p. 63) explains the matter, and why the Court considered it afforded clear evidence of English possession and the exercise of jurisdiction on a basis of sovereignty:

'The object of the *Quo Warranto* proceedings of 1309 mentioned above was to enquire into the property and revenue of the English King. These proceedings, which were numerous, took the form of calling upon persons to justify their possession of property. The Abbot of Val-Richer was summoned before the King's Justices to answer regarding a mill and the *advocatio* of the Priory of the Ecrehos as well as a rent. As the mill was situated in Jersey and the rent was payable there, the proceedings in respect of these objects do not show anything with regard to the status of the Ecrehos. But the question of the *advocatio* is in a different position. Such a right of a patron to presentation to an ecclesiastical office was, according to an ancient Norman custom, considered and treated as a *jus in rem*, inherent in the soil and inseparable from the territory of the fief to which it was attached. (*Grand Coutumier de Normandie*, Chapter CXI, de Gruchy edition, p. 259; *Atiremens et Jugiés d'Eschequiers*, published by Génestal and Tardif, 1921, p. 7, § 18.) When therefore the Abbot of Val-Richer was summoned before the King's Justices in Jersey to answer for this *advocatio*, it must have been on the ground that the Ecrehos, to which the *advocatio* was attached, was within the domain of the English King. And when the Prior of the Ecrehos appeared as the Abbot's attorney in answer to the summons, jurisdiction in respect of the Ecrehos was exercised by the Justices, who decided that "it is permitted to the said Prior to hold the *premissa* as he holds them as long as it shall please the lord the King".'

For an authoritative opinion on both the above-mentioned points from a distinguished

on some other basis than as specific exercises of sovereignty (as to this see subsection (5) below). But the Court in the *Minquiers* case indicated certain acts as having special value as evidence of title (*I.C.J.*, 1953, p. 65):

‘Of the manifold acts invoked by the United Kingdom Government the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation.’

(i) *The exercise of jurisdiction.* As to this, in regard to the Ecréhos group, the Court said (*ibid.*):

‘In 1826 criminal proceedings were instituted before the Royal Court of Jersey against a Jerseyman for having shot at a person on the Ecrehos. Similar judicial proceedings in Jersey in respect of criminal offences committed on the Ecrehos took place in 1881, 1883, 1891, 1913 and 1921. On the evidence produced the Court is satisfied that the Courts of Jersey, in criminal cases such as these, have no jurisdiction in the matter of a criminal offence committed outside the Bailiwick of Jersey, even though the offence be committed by a British subject resident in Jersey, and that Jersey authorities took action in these cases because the Ecrehos were considered to be within the Bailiwick. These facts show therefore that Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years.’

This passage is interesting as also illustrating the principle that acts explicable on another basis than as exercises of sovereignty over the territory concerned, have little probative value in support of a claim. Thus, most countries assume jurisdiction in some degree to take cognizance of offences committed by their own subjects, even in foreign territory. It was because

medievalist, see the correspondence between Mr. R. S. B. Best, the United Kingdom Agent in the case, and Professor T. F. T. Plucknett, of London University, in *I.C.J. Pleadings*, vol. 1, pp. 606-19, and the opinion of the latter at pp. 611 ff.

As regards the *Minquiers*, the Court took account of entries in the Rolls of the Manorial Court of the fief of Noirmont in Jersey in 1615-17, relating to dealings in that Court with wreckage found on the *Minquiers* and taken to Noirmont. The (International) Court upheld the United Kingdom contention that, in the particular circumstances, and having regard to the fact that the jurisdiction of this Manorial Court was purely territorial, and only extended to wreck found within the fief, these dealings showed that the *Minquiers* group was regarded, and treated, as an integral part of the fief of Noirmont in Jersey. The Court said (p. 68):

‘The *Grand Coutumier de Normandie*, to which the French Government has referred in this connection, deals with wreck in Chapter XVII (de Gruchy edition, pp. 48-50) and contains detailed statements as to custody and ownership. The wreck should be guarded and thereafter inspected by the Bailiff or his Officers, whereupon it should be given into custody of the lord of the fief or of “preudes hommes” and kept during a year and a day in case the owner should come forward and claim it. The *Coutumier* enumerates the things to which the Duke of Normandy was entitled and continues: “All things other than these shall enure to the lord in whose fief the wreck is found.” The Court inclines to the view that it was on the basis of this ancient Norman custom that the Manorial Court of Noirmont dealt with these two cases of wreck found at the *Minquiers*. It dealt with them on behalf of “the lord in whose fief the wreck is found”, the lord of Noirmont. In the first case it ordered the Serjeant to take charge of the wreck, in the second case it declared a certain person to be “in default towards the Officers of the Seigneur” for having taken away the wreck, and it ordered some other persons to “keep their day at the next Court”. As the jurisdiction of a local Court such as that of a Manor must have been strictly territorial and, in cases concerning wreck, limited to wreck found within the territory of its jurisdiction, it is difficult to explain its dealing with the two cases unless the *Minquiers* were considered to be a part of the fief of Noirmont.’



the United Kingdom was able to show that Jersey law was peculiar in this respect, and that the Jersey courts had *no* jurisdiction at all except over such offences as were committed within 'Jersey territory'—i.e. Jersey itself or its dependent islets—that the jurisdiction exercised in respect of offences committed by British subjects on the Ecréhos ranked as evidence of sovereignty over that group—for on no other basis could the exercise of jurisdiction be accounted for in the circumstances (see further subsection (5) (iii) below).

(ii) *Local administration.* The acts mentioned by the Court as constituting exercises of local administration over the groups, were the holding of inquests on corpses found there; the levying of local rates and taxation in respect of houses and property on the islets, owned by residents of Jersey; the registration in the public registry of Jersey of contracts of sale and title-deeds of such houses and property; the inclusion of the islets within the Jersey census enumeration; and the establishment of Jersey customs houses on the *maîtresse île* of each group. Another similar factor was the registration in Jersey of fishing boats belonging to Ecréhos residents. The Court said (*ibid.*):

'A register of fishing boats for the port of Jersey shows that the fishing boat belonging to a Jersey fisherman, who lived permanently on an islet of the Ecrehos for more than forty years, was entered in that register in 1872, the port or place of the boat being indicated as "Ecrehos Rocks", and that the licence of that boat was cancelled in 1882. According to a letter of June, 1876, from the Principal Customs Officer of Jersey, an official of that Island visited occasionally the Ecrehos for the purpose of endorsing the licence of that boat.'

Concerning all the above-mentioned acts of administration, the Court said by way of summary (pp. 66 and 69):

'These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos [Minquiers] during a long period of time.'

'*Other facts.*' The Court distinguished the above acts (as clearly being acts of administration proper) from 'other facts' which nevertheless had a bearing on the issue (*ibid.*):<sup>1</sup>

'Of other facts which throw light upon the dispute, it should be mentioned that Jersey authorities have made periodical visits to the Ecrehos [Minquiers] . . . and that they have carried out various works and constructions there, such as a slipway . . . a signal post . . . and the placing of a mooring buoy. . . .'<sup>2</sup>

<sup>1</sup> A good deal was heard in the case as to the degree to which the respective parties had displayed an *interest* in the groups as being a significant indication of where the title might lie.

<sup>2</sup> In the case of the Minquiers group, the Court also instanced the placing of various marking buoys and light beacons. It was proved that although France had placed buoys and beacons in the neighbourhood of the Minquiers, these were primarily intended to mark the approaches to St. Malo in Brittany—whereas all the buoys and beacons on the islets and rocks themselves, and in the waters immediately off them, had been placed there by the Jersey authorities.



(iii) *Legislation*. This was in respect of the Ecréhos. The Court said (p. 66):

'By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehou Rocks" were included within the limits of that port. This legislative Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this Act derogated from the Fishery Convention of 1839. But this protest could not deprive the Act of its character as a manifestation of sovereignty.'

It seems clear from this language that the Court attached particular importance to legislation as a display of State sovereignty. While not sufficient in itself to *create* title, it is one of the clearest evidences of that 'intention and will' to act as sovereign, which has been stressed as being one of the elements necessary in all those cases where a claim to title is founded mainly on a display of State activity in regard to the territory concerned.<sup>1</sup> This leads to the question, to which some reference has already been made, of acts which, though they may be State acts, are, for one reason or another, not sufficient, or not of a character, to be evidence of sovereignty, or to support a claim to title.

(5) ACTS NOT PERFORMED *ANIMUS OCCUPANDI* OR *A TITRE DE SOUVERAIN*, OR NOT REQUIRING A BASIS OF SOVEREIGNTY OVER THE DISPUTED TERRITORY TO EXPLAIN OR JUSTIFY THEM, DO NOT, IN GENERAL, AFFORD EVIDENCE OF TITLE

The *animus occupandi* (using the term *occupatio* in the sense described in subsection (3) (b) above, and footnote 2 on p. 51, as meaning appropriation) being essential in any claim to sovereignty, it follows that for acts to rank in support of title, they must be the acts of the State, not of private parties (unless under a commission from, or subsequently adopted and ratified by, the State);<sup>2</sup> and they must be both intended as exercises of sovereignty over the territory, and only be accountable for on that basis. Therefore three main classes of acts fall to be considered under this head: acts that are not State acts at all; acts that are State acts, but are not performed *animus occupandi* or *à titre de souverain*; and acts which, though they may purport to be so performed, are not (or are not necessarily) exercises of territorial sovereignty over the disputed territory.

(i) *Acts that are not State acts*. This matter has been discussed in its

<sup>1</sup> See also the passage from the Judgment of the Court quoted in subsection (5) (ii) below. The Court thus endorsed the dictum of the Permanent Court in the *Eastern Greenland* case that '... a claim to sovereignty based not upon some particular act or title such as a treaty of cession, but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority' (Series A/B, No. 53, pp. 45-46).

<sup>2</sup> See this *Year Book*, 30 (1953), p. 48, n. 2.

more general aspects in a previous issue of this *Year Book*<sup>1</sup> and, in its relation to the *Minquiers* case, on page 50 above. The question of private activities such as fishing, visits to the groups, quarrying there, building houses, &c., was a good deal discussed in the case. But it was contended on the French side,<sup>2</sup> and tacitly admitted on the United Kingdom<sup>3</sup> side, that such activities certainly could not *per se* be a basis of title, in the sense of *conferring* it, and could only within limits afford evidence of it. This must, of course, depend on the circumstances, but it is significant that although in the *Minquiers* case the circumstances told strongly in favour of such activities as having a considerable evidential value,<sup>4</sup> the Court did not base any conclusion on them as such,<sup>5</sup> though it did draw conclusions from certain related facts, such as the registration, rating and taxation of houses and property on the groups, and the registering of fishing boats (see subsection (4) (ii) above).<sup>6</sup>

(ii) *State acts not performed 'à titre de souverain' over the territory. Absence of 'animus occupandi'.* In the *Minquiers* case, both sides adduced as evidence official hydrographic surveys of the groups and their waters carried out by them; but the Court based no conclusion on these, and only referred to the matter in order to point out that a French naval survey of 1831 was off-set by a previous British one in 1813-15. Generally speaking, the primary object of a hydrographic survey, even an official one, is not the assertion of sovereignty, but the charting of certain waters for marine and cartographical purposes. The matter may have no connexion at all with any claim to sovereignty. Again, the erecting of shelters or refuge huts (*cabanes de sauvetage*) on dangerous shores or in inhospitable regions (another point that arose in the *Minquiers* case) would have as its primary

<sup>1</sup> Vol. 30 (1953), pp. 47-48.

<sup>2</sup> Most of the fishery activity, and practically all the building, had been from Jersey.

<sup>3</sup> Cf., generally, the argument of Mr. C. H. Harrison, C.M.G., Attorney-General of Jersey: I.C.J. Pleadings, vol. ii, pp. 159-63 *passim*.

<sup>4</sup> For instance, there was the point made by Mr. Harrison (see immediately preceding footnote) on p. 161 of vol. ii of the I.C.J. Pleadings:

'Naturally, we agree that if an Englishman owns property in France, that does not make his property English soil, any more than a private French property in England is French soil. But when you find houses on an island, all of which are owned by the subjects of a certain country, and there is no concrete evidence on the island of the sovereignty of, or of administration by, any other country, then a strong and almost irresistible presumption arises that the sovereignty is vested in the country whose nationals own those houses. In such circumstances the presence of the houses, while it might not be *per se* conclusive evidence of sovereignty, is, I submit, very forcible presumptive evidence of it.'

<sup>5</sup> The Court did not, of course, need to, there being more specific and conclusive evidence than this. However, *non constat* but that in the absence of better evidence, the Court would have been willing to give greater weight to the type of point made by Mr. Harrison.

<sup>6</sup> It does not seem that in the interesting remarks made on the subject by Judge Levi Carneiro in his separate Opinion (I.C.J., 1953, pp. 104-5) he was intending to suggest that the purely private activities of individuals could *per se* create, or be a basis of, title. But such activities may, by showing what the state of affairs *de facto* was at a certain date, afford evidence of what it also was *de jure*.



object the safety of life rather than the manifestation of sovereignty, and the same may be the case with the buoying or beaconing of dangerous rocks and reefs.<sup>1</sup> It was in this light that the Court viewed most of the French acts quoted in the case. Summing up the evidence in regard to the *Minquiers* group, the Court said (*I.C.J.*, 1953, p. 71):

‘As to the above-mentioned acts from the nineteenth and twentieth centuries in particular, including the buoying outside the reefs of the groups, such acts can hardly be considered as sufficient evidence of the intention of that [i.e. the French] Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.’

Similarly, speaking of an order of the Jersey Piers and Harbours Committee in 1779 for subsidizing certain life-saving services at the *Minquiers*, the Court said (*ibid.*, p. 69):

‘This shows that the Committee was interested in ensuring such services at the *Minquiers*, but it can hardly be considered as a measure by which authority was exercised in respect of the islets, nor can it be concluded that the Committee made the grant only because it considered the *Minquiers* to be a part of Jersey.’

In short, the primary object was not to exercise sovereignty or jurisdiction, but to provide safety measures.

(iii) *Acts in the exercise of sovereignty, but not accountable for solely as manifestations of territorial sovereignty over the disputed regions. Acts performed ‘ratione personae’, not ‘ratione soli’.* Many State acts in the nature of exercises of sovereignty, performed in connexion with or having some reference to certain territory, or even perhaps performed *on* that territory, can nevertheless be accounted for otherwise than as assertions or exercises of jurisdiction over that territory as such. In short they have another, or another possible, legal basis. Such acts will for the most part be acts performed *ratione personae*, not having any necessary *territorial* implications—as, for instance, when a State takes cognizance in its courts of an offence committed abroad by one of its own subjects.<sup>2</sup> It was the French contention that most of the concrete nineteenth- and twentieth-century acts cited by the United Kingdom were of this kind. As has been seen (subsection (4) above), the Court did not share that view,<sup>3</sup> but in one case it

<sup>1</sup> Other examples may be thought of, for instance, the use of certain territory or waters by a State for purposes of scientific or marine experiments, or for obtaining information for meteorological purposes, or for observation. None of these things necessarily involves an assertion or manifestation of sovereignty as such.

<sup>2</sup> Many States also exercise some jurisdiction *ratione personae* over *foreigners*, but normally only in respect of certain classes of offences. An exercise of jurisdiction over a foreigner in another class of case might simply constitute an *excess* of jurisdiction (i.e. be illegitimate)—or it might be an assertion of jurisdiction *ratione soli* in respect of the *place* where the offence was committed.

<sup>3</sup> Judge Basdevant, on the other hand, though agreeing with the majority in his final conclusion, took a much more restricted view as to what constituted an exercise of territorial authority,



specifically excluded an eighteenth-century act on somewhat similar grounds (*I.C.J.*, 1953, p. 64):

'In 1706 fishermen from Jersey proceeding to the Ecrehos came across a Frenchman there who had just fled from police prosecution in France, and at his request they brought him to Jersey, where he was examined by the authorities. The United Kingdom Government has relied on this examination, but it cannot be considered as an exercise of jurisdiction in respect of the Ecrehos. It was a measure which would naturally have been taken against any fugitive arriving in Jersey who was a national of another State.'<sup>1</sup>

However, it is probably difficult to attribute any *absolute* character to State acts, whether as being manifestations of sovereignty over specific territory or not. Each must be related to the circumstances. It has been seen (subsection (4) (i) above) that the Court regarded certain exercises of jurisdiction over Jerseymen in respect of offences committed on the Ecr hos as being assertions of sovereignty over that group because under Jersey law penal jurisdiction was wholly territorial and had no personal basis. Conversely, such acts as the extension of a census to cover persons in certain territory, which, in the particular circumstances of the *Minquiers* case, the Court considered to be a manifestation of sovereignty over the groups, would have quite a different character if a government was specifically purporting to ascertain the number of its citizens resident *abroad* and in *foreign* countries at a given moment.<sup>2</sup>

#### (6) ACTS OR OMISSIONS INCONSISTENT WITH, OR TENDING TO NEGATIVE, THE EXISTENCE OF SOVEREIGNTY

Just as manifestations of sovereignty are necessary to support a claim to sovereignty, and certain acts constitute such manifestations while others do not, or do not necessarily do so, so also certain acts or omissions may be

and would not concede this character as necessarily appertaining to any of the acts mentioned in subsection (4) above. His view on the point of principle involved was expressed in the following passage (*I.C.J.*, 1953, p. 82):

'There are numerous facts, the existence of which has not been challenged—although there is disagreement as to the conclusions to be drawn therefrom—which show that the Jersey authorities have for a long time, on repeated occasions and in a consistent manner, concerned themselves with what was happening on the Ecrehos and the Minquiers and have acted accordingly. They have done so by the assumption of jurisdiction and by police and administrative acts. I have some hesitation in regarding the assumption of jurisdiction as the assumption of territorial jurisdiction. The facts to which the jurisdiction related occurred on islets which are not much more than emerged rocks on which there was no established authority, and they could thus easily furnish the occasion for an extension of jurisdiction just as if the wrong had been committed or the wreckage had been gathered on the high seas.'

<sup>1</sup> Strictly, this was an exercise of jurisdiction *ratione soli* in respect of Jersey itself, over someone coming to or brought there.

<sup>2</sup> On the other hand, and while admitting the force of Judge Basdevant's views, it is difficult to regard certain other acts, such as the holding of inquests, the rating and taxation of houses and real property, and the exercise of customs control, in any other light than as manifestations of territorial jurisdiction and administration.

*inconsistent* with the claim of sovereignty, or tend to negative the existence of title, by pointing rather to an absence of it. Thus a failure by one party claiming title to territory to protest against acts that would be encroachments on its sovereignty if title existed, may be evidence of the non-existence of such title. In the *Minquiers* case, this matter arose under the following heads: (a) failure of the vigilance to be expected of a country having sovereignty, and failure to react against encroachments or derogations, by protest or otherwise; (b) admission or recognition, direct or tacit, of the other party's title; (c) disclaimer, direct or tacit, of a party's own title; (d) other considerations tending to negative the existence of title.

(a) *Failure of vigilance or adequate reaction*

This matter arises chiefly with regard to the question of protests,<sup>1</sup> or rather of a failure to make them when due. Where the protest is actually made, the principal effect is to preserve, *pro tanto*, the position of the party making it, but without necessarily affecting that of the other party. This point was considered in this *Year Book*, 30 (1953), pp. 43-44, where it was shown that in the *Minquiers* case the Court endorsed the view that the protests of one party could not serve to nullify the acts of the other, for what these were worth as manifestations of sovereignty,<sup>2</sup> but could only serve to keep alive the claim of the protesting party, and to prevent it lapsing by tacit abandonment. On the other hand, a *failure* to protest, where a protest is called for,<sup>3</sup> must have a detrimental effect on the position of the party concerned and may afford evidence of non-existence of title.<sup>4</sup> The matter has four possible, and theoretically distinct, aspects. A failure to protest may: (i) amount to a tacit abandonment by the State concerned of its own title, assuming that to exist or to have existed; (ii) involve a failure to check the acquisition of a title by prescription on the part of

<sup>1</sup> But not exclusively, since there are other ways of reacting to some situations than by diplomatic protest. For instance, Judge Basdevant in an interesting passage (*I.C.J.*, 1953, p. 81) pointed out that on certain occasions the British Government had contented itself with a diplomatic protest when it could have proceeded by direct action against French nationals on the groups whose conduct was in alleged derogation of British sovereignty. Judge Basdevant seems to have regarded the failure to take the *most* specific action open to a sovereign authority as indicating in the circumstances a recognition by the British Government of some element of uncertainty or ambiguity in the situation.

The whole question of the exact circumstances in which a country is called upon to react against encroachments on, or derogations from, a sovereignty which it claims, and the degree and character of the reaction called for, is a difficult one. But although it was much discussed by the parties in the *Minquiers* case, it was only marginally referred to by the Court, and therefore a full inquiry into it here would exceed the scope of this study.

<sup>2</sup> See subsection (4) (iii) above.

<sup>3</sup> There must of course be knowledge, actual or presumptive, of the events or circumstances calling for a protest (see this *Year Book*, 30 (1953), pp. 33-42). Subject to that, it might be said generally that a protest is called for whenever failure to make it will, in the circumstances, justify the inference that the party concerned is indifferent to the question of title, or does not wish to assert title, or is unwilling to contest the claim of the other party.

<sup>4</sup> Or may even, in some circumstances, amount to a recognition of the other party's title.



another State; (iii) amount to acquiescence in, or an admission of the validity of, the claim of the other party to the dispute; and (iv), without necessarily implying (iii), constitute an admission (or evidence) of the non-existence of the title of the non-protesting party. All these aspects of the matter were discussed by the parties in the *Minquiers* case. In so far as they were dealt with by the Court, they are considered under heads (b) and (c) below. However, the essential feature in the whole question of protests, and the necessity for them in certain circumstances as evidence of title, was brought out by the United Kingdom contention in the case that the failure on the French side to protest at the dealings of the Jersey authorities with the disputed groups, and in particular at the construction of permanent public works and installations there, was irreconcilable with the French claim to sovereignty over the groups, since it was not the kind of conduct normally to be expected from a country having, or believing itself to have, title. Thus Counsel for the United Kingdom<sup>1</sup> said:

'I submit that there was in fact every reason for France to object to these Jersey works *if France claimed sovereignty*—there lies the whole point. When the French position was that the groups were *French* territory, there was surely every reason to protest—or at least say something. Is it usual for one country to allow the authorities of another country to land on its territory, construct slipways, erect beacons and so forth without saying a word about it?'

(b) and (c) *Admissions and disclaimers*

The Court, in the *Minquiers* case, allowed considerable play to the effect of admissions, or what were regarded as amounting to admissions, on questions of title. These were cited by the Court as confirming the conclusion based on the facts (see subsection (5) (ii) above), that France had not adequately manifested her intention of acting as sovereign over the *Minquiers*, the Court finding (*I.C.J.*, 1953, p. 71) that

'A perusal of the diplomatic correspondence between the two Governments from the beginning of the nineteenth century confirms this view.'

The Court then proceeded to cite the three instances which will be found quoted in full in connexion with the general topic of admissions in this *Year Book*, 30 (1953), at pp. 45–47. The following points may be noticed:

(i) *Direct admissions or acknowledgement (recognition) of the other party's title.* The Court cited and gave due weight, as 'evidence of the French official view at that time', to a Note from the French Ambassador in London to the Foreign Office, transmitting a copy of a letter dated 14 September 1819 from the French Minister of Marine to the French Foreign Minister, 'in which the *Minquiers* group was said to be "*possédés par*

<sup>1</sup> Mr. Harrison (see above, p. 56, n. 3): *I.C.J. Pleadings* vol. ii, p. 176.



*l'Angleterre*”, and in one of the charts enclosed, the Minquiers group was indicated as being British’.<sup>1</sup>

(ii) *Tacit admission (recognition) of the other party’s title, through failure to refute a claim to it.* The Court cited the diplomatic interchange of 1869, when a British Note to the French Government complained of depredations and thefts of fishing gear by French fishermen at the Minquiers group, which was referred to as ‘this dependency of the Channel Islands’. As the Court said, the French Government in their reply ‘refuted the accusation against the French fishermen,<sup>2</sup> but made no reservation in respect of the statement that the Minquiers group was a dependency of the Channel Islands.’<sup>3</sup>

(iii) *Disclaimer of title.* A party may, without admitting the title of the other side, have in effect admitted the non-existence of its own, by a disclaimer of it, which may be express or tacit:

*a. Express disclaimer.* The Court found that in the case of the Ecréhos, something of the kind had occurred in the following circumstances (*I.C.J.*, 1953, pp. 66-67):

‘In the course of the diplomatic exchanges between the two Governments in the beginning of the nineteenth century concerning fisheries off the coast of Cotentin, the French Ambassador in London addressed to the Foreign Office a Note, dated June 12th, 1820, attaching two charts sent from the French Ministry of Marine to the French Ministry of Foreign Affairs purporting to delimit the areas within which the fishermen of each country were entitled to exclusive rights of fishery. In these charts a blue line marking territorial waters was drawn along the coast of the French mainland and round the Chausey Islands, which were indicated as French, and a red line marking territorial waters was drawn round Jersey, Alderney, Sark and the Minquiers, which were indicated as British. No line of territorial waters was drawn round the Ecrehos group, one part of which was included in the red line for Jersey and consequently marked as belonging to Great Britain and the other part apparently treated as *res nullius*.’

*b. Tacit disclaimer.* The Court cited the British Treasury Warrant of 1875 as being a legislative act in respect of the Ecréhos (see subsection (4) (iii) above) and as being ‘a clear manifestation of British sovereignty over the Ecréhos at a time when a dispute as to such sovereignty had not yet arisen’, because it constituted Jersey a port of the Channel Islands, and included the Ecréhos within the limits of that port. The French Government duly disputed the claim so implied, but not on the ground of its own sovereignty. Instead, as the Court found (p. 66), it merely ‘protested . . . on the ground that this Act derogated from the Fishery Convention of 1839’.<sup>4</sup>

<sup>1</sup> Judge Basdevant, however, was unwilling in the circumstances to read an admission into this statement; see this *Year Book*, 30 (1953), p. 45, n. 2.

<sup>2</sup> The refutation consisted exclusively of a denial of the facts.

<sup>3</sup> As the passage in question goes on to observe, it was not until 1888 that any formal French claim to the Minquiers group was made.

<sup>4</sup> For the significance of this, see under § 1 above (‘Critical Date’), subsection (4) (a).

The Court seems to have thought that by so doing, the French Government must be taken to have treated the group as ownerless at that time, no French claim being made until later, and further acts tending in the same direction were cited (p. 67):

'When the French Government in 1876 protested against the British Treasury Warrant of 1875 and challenged British sovereignty over the Ecrehos, it did not itself claim sovereignty, but continued to treat the Ecrehos as *res nullius*. In a letter of March 26th, 1884, from the French Ministry of Foreign Affairs to the French Minister of Marine, it was stated that the British Government had not ceased to claim the Ecrehos as a dependency to the Channel Islands, and it was suggested that French fishermen should be prohibited access to the Ecrehos. It does not appear that any such measure was taken, and subsequently, in a Note to the Foreign Office of December 15th, 1886, the French Government claimed for the first time sovereignty over the Ecrehos.'<sup>1</sup>

A somewhat similar, but more concrete, episode occurred as regards the Minquiers group in the period 1929-37. A French national, Le Roux, having started the construction of a house on the Minquiers under a lease obtained from the French authorities, the United Kingdom Government protested to the French Government. No reply was received, but the construction ceased. The Court found (p. 72) that this cessation must be attributed to French official action, implying a disclaimer of title, because in a French Note of 1937 to the Foreign Office it was stated that the French Government 'did not hesitate, a few years ago, to prevent the acquisition of land on the Minquiers by French nationals'.<sup>2</sup>

(d) *Other considerations implying absence of title*

No more need be said under this head than that a failure to perform certain acts or set up certain institutions normal to the exercise of sovereignty and jurisdiction, will be detrimental to a claim of title. Thus in the Minquiers case, the United Kingdom criticized adversely the failure of the French Government to establish or exercise any kind of administrative régime for the disputed groups: that is, on the hypothesis—maintained by France—of the existence of French sovereignty. The French reply, that countries were not bound to set up a system of administration in respect of every islet off their coasts, would have had some force<sup>3</sup> but for the

<sup>1</sup> The letter of 26 March 1884 had been published, and therefore, had the suggested prohibition been put into effect, this would, in the circumstances, have amounted to an actual recognition of British title. As it was, the language of the letter amounted to a tacit disclaimer of any French claim.

<sup>2</sup> This Note, for the full text of which see I.C.J. Pleadings, vol. i, pp. 292-3, can certainly not be read as involving any recognition of United Kingdom title. It cannot even be read *in itself* as involving a disclaimer of French title, since it specifically professed an intention not to do so. But it was the *act* of the French Government in forbidding attempted acquisitions of land on the Minquiers group by French nationals that impressed the Court—(see further, subsection (7) below).

<sup>3</sup> Because of the *dictum* in the *Island of Palmas* case (reported in *American Journal of International Law*, 22 (1928), p. 877) that '... sovereignty cannot be exercised in fact at every moment on every point of a territory . . . '.



existence of the British competing claim,<sup>1</sup> of which the French Government must have been aware. There was also adverse criticism of the French admission of lack of knowledge of certain happenings on the groups, which, it was suggested, was incompatible with a claim to sovereignty over them, since a sovereign government must be presumed to have at any rate a general awareness of what goes on in its territory.<sup>2</sup> Judge Levi Carneiro made this point when he said (*I.C.J.*, 1953, p. 106) that:

'... the French Government should have kept the islets under surveillance, just as the British Government had done. ... Failure to exercise such surveillance and ignorance of what was going on on the islets indicate that France was not exercising sovereignty in that area.'

#### (7) GREATER PROBATIVE FORCE ATTRIBUTABLE TO A STATE'S ACTS AND CONDUCT THAN TO ITS PROFESSIONS

This principle emerged very clearly in the *Minquiers* case. It will be remembered (see subsection (2) above) what stress the Court laid on the concrete evidence 'which relates directly to the possession of the ... groups'. Again, one of the reasons why the Court rejected the French contention based on the Fishery Convention of 1839<sup>3</sup> was that it was

'... not compatible with the attitude which the French Government has taken since that time. It not only claimed sovereignty over the Ecrehos in 1886 and over the Minquiers in 1888 and later, but it has, in order to establish such sovereignty, itself relied on measures taken subsequent to 1839. ...'<sup>4</sup>

It is moreover clear that certain fairly direct admissions of British, or disclaimers of French, title over the groups, on the part of French Ministers and authorities (see under subsection (6), (b) and (c), above), counted for far more with the Court than the *subsequent* French claims to sovereignty and denials of British title. The most striking example, however, was afforded by the Le Roux incident (referred to at the end of subsection (6), (b) and (c), (iii) above), for the French Note in question specifically proceeded on the basis that the question of sovereignty was 'non résolue jusqu'à ce jour' and had

<sup>1</sup> Cf. the *dictum* of the Permanent Court in the *Eastern Greenland* case (Series A/B, No. 53, p. 46) that 'particularly ... in the case of claims to sovereignty over areas in thinly populated or unsettled countries', 'very little in the way of the actual exercise of sovereign rights' may be necessary '*provided that the other State could not make out a superior claim*'—(italics added).

<sup>2</sup> Whether, and if so to what extent, a government is under an international duty of knowledge and awareness of what goes on in its territory, so as to incur responsibility for failure to prevent certain prejudices to a foreigner, is another and a larger question. But lack of such knowledge is certainly a material factor in assessing the worth of any *claim to title*.

<sup>3</sup> See under § 1 above ('Critical Date'), subsection (4) (a).

<sup>4</sup> The point was that having once claimed sovereignty, the French Government then proceeded to cite in support of it a number of acts which, according to its previous attitude based on the 1839 Convention, were invalid or incapable of being adduced in support of a claim to sovereignty. The French Government clearly could not *both* do this *and* maintain that its interpretation of the 1839 Convention was correct, as was attempted in the proceedings before the Court.



'jamais encore été réglée', and accordingly professed in terms that the French Government, 'n'ayant jamais renoncé et n'ayant pas le dessin de renoncer à ses droits souverains sur les îles Minquiers', reserved its position as regards the validity of the act of the Jersey authorities in establishing a customs post on the Minquiers. Yet the Court discounted all this, and looked only to the fact, recited in the same Note, that the French Government had prohibited French nationals from acquiring land on the Minquiers. This was considered to show that the cessation of the construction of a house there by a French national some years earlier, after a protest by the United Kingdom Government, was due to official French intervention. It was the *conduct* of the French Government, rather than its professions or reservations, that weighed with the Court. *The importance of this attitude on the whole question of 'paper' claims—and, for that matter, of paper protests and paper reservations—can scarcely be over-emphasized.*<sup>1</sup>

#### (8) THE ELEMENT OF COMPETITION AND COMPARISON IN ASSESSING RIVAL CLAIMS TO TERRITORY

(a) It is clear, and certainly emerges very definitely from the *Minquiers* case, that the weight to be given to any act, presumption or situation, and equally to any omission, is not an absolute question, but depends very much on whether a competing claim is in the field, and also on what is the character and intensity of that other claim.<sup>2</sup> Acts which would suffice as evidence of title, or omissions which would have no particular significance in the absence of a competing claim, acquire a wholly different complexion if there is one. Similarly, the question of what is required is affected by that of what has to be met in the way of the acts of the other claimant. Acts that will be sufficient, or, conversely, neglects that will be immaterial, in the face of a low degree of counter-activity, will not be so if that counter-activity is high. As has already been observed (see § 1 above ('Critical Date'), subsection (3) (iii), and passages there quoted), the whole finding of the

<sup>1</sup> Reference may be made to § 1 at the start of the present article, on the subject of the critical date. The whole question is a difficult one, and it is not intended to suggest that a diplomatic claim, protest or reservation has no value or effect (at any rate for the time being). The point is, rather, that when it is *contradicted* by, or inconsistent with the *acts* of, the State concerned, positive or negative—i.e. including omissions or failure to perform certain acts—it is the acts or omissions that are, in law, to be regarded as representing the true attitude of the State. Indeed, it is probably only when such a contradiction or inconsistency exists or arises that the claim, protest or reservation can be said to be, or to become, a 'paper' one. It is not the mere fact of being on paper that makes it so, but that of *only* being on paper, or of being nullified by more concrete facts that are not merely on paper.

<sup>2</sup> This emerged clearly in the *Palmas* case, and, in the *Eastern Greenland* case, in addition to the passage cited above, p. 63, n. 1, the Permanent Court said (at p. 46):

'Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power.'

And see also subsection (9) (iii) below.

Court in the *Minquiers* case was based not so much on the intrinsic worth of the parties' claims as on their *relative* worth. As Counsel for the United Kingdom<sup>1</sup> stated, 'the essential issue in this kind of case is not so much "What has each party done?" but "Which party has done the most?"'<sup>2</sup> It was repeatedly emphasized on the United Kingdom side that presumptions of French title that might have held good in the absence of a competing claim, could not do so in the actual circumstances (and this was implicitly endorsed by the Court—see subsection (2) above). In the same vein, it was contended that French inaction, ordinarily understandable, became inexplicable in the circumstances, and amounted to a virtual renunciation of claim in the face of British activity, the nature of which called for stronger reaction or counter-action than was in fact forthcoming on the French side.

(b) The matter has a close connexion with that of the necessity for continuity in the upkeep of title, which forms the subject of subsection (9) below. In the *Clipperton Island* case,<sup>3</sup> France had displayed no activity in regard to the disputed territory for thirty-nine years, since first taking possession in 1858. Subsequently (in 1897) Mexico asserted a claim to the island. But, no other State having in the meantime claimed or manifested any activity either, France's original *prise de possession* was regarded as still holding good, and as not having been renounced or abandoned.<sup>4</sup> However, as Professor Waldock points out,<sup>5</sup> this inactivity on the part of France 'would surely have been fatal to her claim<sup>6</sup> in the face of an intervening exercise of sovereignty by another state'. That this would have been the Arbitrator's view seems clear from the following passage from the Award,<sup>7</sup> in which the Arbitrator, after having stated that 'in ordinary cases' the initial *prise de possession*, evidencing *animus occupandi*, must be followed up by the establishment of a definite régime in the territory, went on:

'There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, *from the first moment when the occupying State makes its appearance there, at the absolute and undisputed disposition of that State*—from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed'—(italics added).

The effect of the passage italicized would seem to be that any subsequent or

<sup>1</sup> Sir Lionel Heald (see above, p. 35, n. 3).

<sup>2</sup> I.C.J. Pleadings, vol. ii, p. 57.

<sup>3</sup> See reference above, p. 22, n. 1.

<sup>4</sup> The Arbitrator said: 'There is no reason to suppose that France has . . . lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitely perfected.' But for *how long* this state of affairs could have continued is another matter—see below, subsection (9).

<sup>5</sup> Loc. cit. (see above, p. 48, n. 1), p. 325.

<sup>6</sup> Because then, given French inactivity, including, *ex hypothesi*, failure to react to the activity of the other State, an abandonment of the French claim could have been implied. At the least, the island would have reverted to the status of a *res nullius*, and if not claimed by any other country in the meantime, would have been open to Mexico's claim in 1897.

<sup>7</sup> See the report (cited above, p. 22, n. 1), p. 393.



intervening manifestation of sovereignty by another State—unless immediately reacted against (as France reacted against Mexico's intervention)—would have been detrimental to the French claim still to be sovereign at the date of the Mexican assertion of claim, unless it had been offset by some concrete activity on the part of France over and above her initial *prise de possession*. In short, given no competing claim, such inactivity over the relatively short period of thirty-nine years<sup>1</sup> had no direct significance or effect. But in the face of a competing claim—or even of some activity by another State—it could have led to the conclusion *either* that the original French claim had never been adequately completed, *or* that it had been tacitly abandoned or lost, and that the island therefore was, or had become, *res nullius* at the date of the Mexican claim, so as to be open to that claim.

(9) NECESSITY FOR CONTINUITY IN THE UPKEEP OF TITLE. CONTINUING STATE ACTIVITY. EFFECT OF DISCONTINUITY OR INACTIVITY

(a) *General considerations*

This principle is now well established in consequence of the *Island of Palmas* case,<sup>2</sup> but its application is not free from certain difficulties.<sup>3</sup> For a discussion of the whole matter reference may be made to Professor Waldock's article already cited.<sup>4</sup> The principle was endorsed implicitly by the Court in the *Minquiers* case, and to some extent explicitly. It has two aspects, and it is important to distinguish between them, namely, (a) discontinuity as constituting (or as evidence of) tacit abandonment of title by desuetude, or as leading to loss of title by *derelictio*; and (b) discontinuity as operating to prevent the acquisition of any completed title in the first place, or as evidence that no valid title was ever acquired. In short—if a little paradoxically—continuity may be an element not merely in the *retention*, but in the *establishment*, of title. The matter may be considered in relation to titles based on occupation, prescription and ancient right.

(i) *Title based on occupation*. Once such a title has been definitively acquired, discontinuity, or failure to keep it up,<sup>5</sup> will operate as evidence of

<sup>1</sup> But *indefinite* inactivity would, it is believed, eventually prove fatal to a claim in any circumstances—i.e. even in the absence of intervening activity by another State—by leading to an irresistible inference of abandonment, thus opening the door to a *prise de possession* by another State. However, this must always depend very much on the circumstances—see subsection 9 (a) (ii) below.

<sup>2</sup> See, for instance, the well-known passage in which Judge Huber stressed the need for effectiveness not only in the act of acquisition but in its *maintenance*—(Report in *American Journal of International Law*, 22 (1928), p. 876).

<sup>3</sup> For instance—see Waldock, *loc. cit.* (above, p. 48, n. 1), p. 321, n. 3—how far is the requirement relevant not merely to the case of comparatively newly acquired, but also to that of old-established, sovereignties?

<sup>4</sup> *Ibid.*, especially pp. 320–1 and 337 ff.

<sup>5</sup> By a cessation or failure of State activity or manifestation of State authority. But the question of how much State activity is called for in the conditions of the territory, and for how long the inactivity must continue, must depend on the circumstances.



abandonment in some form, or will at any rate cause title to be lost.<sup>1</sup> But it may also go to the question of whether the occupation itself was ever effective. Just as a title by *discovery* is inchoate, and will lapse if not followed up by effective occupation, so one or two single acts of occupation, not followed by any others, may be held to be insufficient to give a definitive title—though, in the light of the *Clipperton Island* case,<sup>2</sup> probably only if there have been intervening acts by another State, not reacted against; or if a very considerable period of time has gone by, so that the force of the original acts of occupation can be regarded as wholly spent<sup>3</sup>—(what this period will be, must naturally depend on the circumstances and the character of the territory).<sup>4</sup> However, once a clear title based on occupation is held to have been finally and definitively established, it would seem also to result from the *Clipperton Island* case that *abandonment*, as such, would normally have to be express or manifest, and could only be presumed from mere inactivity if there was a competing claim, or if inactivity was so long continued as to constitute abandonment or to lead to an irresistible inference of intention to abandon, even if only tacit.<sup>5</sup>

(ii) *Titles based on prescription*. Continuity of activity is essential to the acquisition of a title by prescription<sup>6</sup>—is, indeed, of the essence of the prescriptive process—and an interruption in it will be fatal to the claim in so far as it is based on the acts done up to that date, that is to say, the prescriptive process, to be valid, would have to start afresh. On the other hand, once a definitive title has been finally acquired by prescription, *subsequent* discontinuity or inactivity would operate in the same way as for an acquired title arising from occupation.

<sup>1</sup> *Abandonment or 'derelictio' and the question of intention*. This was not much discussed in the *Minquiers* case, except in the form of whether either party could be said to have tacitly acquiesced in the claim of the other. In actual fact, apart from specific cessions or renunciations by treaty, States very seldom formally renounce title. But they may *lose* it, and the question of intention, if latent, is really one of inference from the facts. Moreover, so far as abandonment proper is concerned, the question is less whether *title* has been abandoned, than whether the *territory* has; or has simply been lost by a process which, if perhaps involuntary, or not due to any deliberate intention, is nevertheless one that entails the legal consequence of loss of title. It is more a matter of theory than of practical import whether the case is viewed from the standpoint that international law requires title to be kept up by State activity appropriate to the circumstances, and if this is not done the title is lost; or whether it is postulated that a sufficient failure of State activity leads to an inference of intention to abandon, or amounts to a tacit abandonment in fact.

<sup>2</sup> See reference in footnote 1 on p. 22 above.

<sup>3</sup> In the *Clipperton* case, where a remote and uninhabited island was concerned, thirty-nine years was not considered long enough to have this effect. But *in the course of time*, inactivity must produce a *derelictio* and a reversion to the status of a *res nullius*. This seems to have been the Permanent Court's view in the *Eastern Greenland* case—see subsection (iii) below.

<sup>4</sup> On this aspect, the related question of geographical contiguity or proximity to other territory under the same sovereignty may be relevant, as eking out what would otherwise be an insufficient display of activity in regard to the disputed area, purely as such—see under subsection (10) below.

<sup>5</sup> Or, to put it in the language of the alternative theory (cf. above, n. 1) as stated by Waldock (loc. cit., p. 321), '... an established title may be lost not only by voluntary abandonment but by mere inactivity, that is, by failure to display state activity with a continuity appropriate to the circumstances'.

<sup>6</sup> See Johnson, loc. cit. (above, p. 20, n. 2), *passim*.

(iii) *Titles based on ancient right and immemorial possession* (as in the *Minquiers* case). Here the element of continuity goes to the very root of the question of title *on that basis*, for the ancient right is lost or overlaid, and the immemorial possession will not be immemorial, if what was an original title can be held not to have been kept up. Later acts—or a resumption of activity after the break—may furnish a fresh point of departure, leading to the acquisition or re-acquisition of title by occupation or prescription, but it will be a different basis of title. At the same time (see also pp. 70–71 below), if a root of ancient right can be shown, considerable *gaps* can occur in the display of State activity without interrupting or extinguishing it,<sup>1</sup> subject always to the impact of any competing claim. This was very clearly demonstrated in the *Eastern Greenland* case, to which in some of its aspects the *Minquiers* case bore a considerable resemblance. In the *Eastern Greenland* case, the Permanent Court found that in 1380, when the Danish and Norwegian Crowns were joined, the King of Denmark–Norway could be regarded as sovereign over Greenland by virtue of long-continued effective occupation and settlement. But some time after 1380 the Norse settlements in Greenland disappeared, and for the next two centuries or more ‘there seems to have been no intercourse with Greenland, and knowledge of it diminished; but the tradition of the King’s rights lived on’,<sup>2</sup> and certain facts could be pointed to as showing that in relation to Greenland ‘the King considered that . . . he was dealing with a country with respect to which he had a special position superior to that of any other Power’.<sup>2</sup> Nevertheless, the Court does not seem to have thought that this position quite amounted to sovereignty:<sup>2</sup>

‘That the King’s claims amounted merely to pretensions is clear, for he had no permanent contact with the country, *he was exercising no authority there*. The claims however were not disputed. No other Power was putting forward any claim to territorial sovereignty in Greenland, *and in the absence of any competing claim* the King’s pretensions to be the sovereign of Greenland subsisted’—(italics added).

The exact legal position which, in the Permanent Court’s view, resulted from this state of affairs, is not entirely clear; but it would seem that the Crown of Denmark–Norway was regarded as having had some sort of inchoate or imperfect title during this period, not amounting to actual sovereignty, but, in the absence of any competing claim, sufficient to preserve the connexion with, or maintain the thread of, the sovereignty previously possessed—so that the latter would automatically revive when effective occupation was resumed, as occurred in and after 1721. In short, instead of

<sup>1</sup> There is, however, no presumption that a sovereignty shown to have existed at one time is to be deemed to have continued if there is no proof to the contrary—see *per* Judge Huber in the *Palmas* case, as cited above, p. 66, n. 2. He concluded (pp. 904–5) that it was ‘for the tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals’.

<sup>2</sup> P.C.I.J., Series A/B, No. 53, p. 47.



sovereignty starting afresh in 1721, it was in effect held to relate back to the date of the original assertion of it. It seems quite clear, however, that the Court would have held the original title to have become wholly lost by desuetude over the two centuries of inactivity if *either* there had been a competing claim actively maintained at the time *or* if there had been a failure to renew, or too long a delay in renewing, the concrete occupation. These circumstances afforded a very close parallel to those of the *Minquiers* case, as was pointed out by Counsel for the United Kingdom.<sup>1</sup> There, too, there were original claims based on ancient right and the concrete exercise of jurisdiction,<sup>2</sup> followed by gaps and considerable periods of obscurity. In the case of France, these gaps and periods were fatal to her claim because there was a competing State activity, and because they were not followed by any real renewal of French activity in respect of the groups.<sup>3</sup> There were also gaps and obscurities in the British position, but they were less serious, more susceptible of being accounted for by the play of probabilities, and the competing claim was less strong—indeed, at that date, hardly evident as such (for if there was a latent competing *claim*, there was no concrete competing State *activity*). Finally, on the British side, evidence of concrete manifestations of sovereignty reappeared and multiplied increasingly up to the present time. Speaking of the French position in the light of the *Eastern Greenland* case, Counsel for the United Kingdom said:<sup>4</sup>

‘It is just conceivable that, supposing France to have had an original title to the Minquiers and Ecrehous, this might have simply continued even without any concrete display of State authority, provided France had been alone in the field—although we believe that both the *Eastern Greenland* and the *Palmas* cases are against the view that, even in that case, these rights would have continued *indefinitely*. But with an actively competing claim in the field, over the whole period, any such original rights were bound to suffer extinction unless supported by effective possession and control, and by the active exercise of State authority.’

(b) *The attitude of the Court in the Minquiers case*

(i) It is clear from the whole approach of the Court in the *Minquiers* case, that it approved the now well-known *dictum* of Judge Huber in the *Palmas* case that there could not be effective occupation ‘if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right’.<sup>5</sup> This is implicit in its attitude on the question of presumptions, and from the way in which the Court traced the concrete evidence of possession throughout the historical period and up to modern times (see generally subsections (2) and (3) above). It can also be seen from the

<sup>1</sup> Speech of Sir Lionel Heald: I.C.J. Pleadings, vol. ii, pp. 56 ff.

<sup>2</sup> Whether directly or through a feudal tenure.

<sup>3</sup> According to the United Kingdom contention, there never at any time was any true *French* as opposed to *Norse* (Norman) activity in the Channel Islands.

<sup>4</sup> I.C.J. Pleadings, vol. ii, p. 57.

<sup>5</sup> See above, p. 66, n. 2.



following passage, quoted in a previous article<sup>1</sup> in connexion with the topic of the inter-temporal law (*I.C.J.*, 1953, p. 56):

'The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law at the time of replacement. It is for the French Government to establish that it was so replaced. The Court will later deal with the evidence which that Government has produced with a view to establishing that its alleged original title was replaced by effective possession of the islets in dispute.'

The Court then continued (*ibid.*, pp. 56-57):

'With regard to the Judgment of 1202 invoked by France it is the opinion of the Court that, whatever view is held as to its existence, validity, scope and consequences, it was not executed in respect of the Channel Islands, the French Kings having failed to obtain possession of these Islands except for brief periods. Even if this feudal Judgment, assuming that it was in fact pronounced, was intended to produce legal effects at that time, it remained in any case inoperative with regard to the Channel Islands. *To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations.*' —(Italics added.)

*These passages, even if only indirectly, seem to establish in the jurisprudence of the Court the necessity for continuity and upkeep of title appropriate to the circumstances of the territory and the state of the law.*

(ii) *Gaps*. The Court in the *Minquiers* case took no account of the fact that, from about 1550, 'The close relationship between the Ecréhos and Jersey ceased and for a considerable period thereafter<sup>2</sup> the islets were only occasionally visited by Jerseymen for the purposes of fishing and collecting seaweed' (*I.C.J.*, 1953, p. 64). This occurred because, as a result of the Reformation in England and the measures taken against the monasteries, the rents of the Priory on the Ecréhos<sup>3</sup> were confiscated, so that this Priory 'having lost its means of subsistence, some time later was abandoned and the chapel fell into ruins' (*ibid.*). It is instructive to compare this situation with that in respect of eastern Greenland after 1380 (see subsection (a) (iii) above), and the extinction of the Norse settlements. On the Ecréhos, too, a sort of settlement had been extinguished, but the case was not the same, for the 'settlement' on the Ecréhos was not, and never had been, a Jersey settlement as such, or of such a nature as to give title in sovereignty. The whole group of the Ecréhos was 'held' by the Abbey of Val-Richer in Normandy on a feudal tenure from the English Crown.<sup>4</sup> This, of course, in

<sup>1</sup> In this *Year Book*, 30 (1953), at p. 8.

<sup>2</sup> Perhaps about 200 years.

<sup>3</sup> As to this Priory see above, p. 51, n. 5.

<sup>4</sup> The grant of the fief of the Channel Islands by King John of England to Piers de Préaux (see above, p. 52, n. 1) was subsequently forfeited on account of disloyalty in the French wars. *Id.*

itself, gave no title in sovereignty to the French king, whether as overlord in respect of Val-Richer's *Norman* possessions or otherwise. From the standpoint of territorial sovereignty, Val-Richer was simply a private law occupier, as for instance today a Frenchman might own a property in England. Whether Val-Richer maintained a Priory on the group or not was its affair<sup>1</sup>—or, at any rate, the fact that it did not do so, or that the Priory fell into disuse, could neither sever the feudal link between the Ecréhos and the Channel Islands, nor (in consequence) affect the legal position as regards sovereignty.

(iii) *The geographical factor.* This is the subject of a separate subsection (see (10) below), but that subsection can conveniently be introduced by a comparison of the case of the Ecréhos with that of eastern Greenland, for there was another great difference between the two cases—geographical distance. It has already been shown that the disuse by Val-Richer of its priory on the Ecréhos did not of itself affect the legal link between that group and the main Channel Islands: whereas the total extinction of the Norse settlements in Greenland did affect the sovereignty of the Dano-Norwegian Crown, for it was only through these settlements that this Crown could exercise any State authority there at that time—and for this, the factor of distance was largely responsible.<sup>2</sup> It will be remembered (see subsection (a) (iii) above) that the Permanent Court said that the King of Denmark-Norway 'had no permanent contact with the country, he was exercising no authority there'. Far different was the case of the Ecréhos, situated less than four sea miles from Jersey, one of the main centres of the Channel Islands. Here no necessary presumption of lack of contact, or inability to exercise authority, could arise from the mere absence of an actual settlement on the group. These considerations serve to show why, failing any French activity at the time, the Court did not regard the gap of some two centuries in English activity<sup>3</sup> as affecting the legal continuity of the English title to the Ecréhos.<sup>4</sup>

thereupon reverted to the Crown, which administered it through Wardens. Thenceforward the Ecréhos were held by Val-Richer direct from the English Crown.

<sup>1</sup> It is true that the grant obliged Val-Richer to maintain a church on the Ecréhos and hold services there. But failure to comply with these obligations would merely injure *Val-Richer* by causing a breach of the conditions of its tenure, justifying a forfeiture of the grant. It could not affect the English title to territorial sovereignty over the Ecréhos, which was implicit in the very fact of the feudal grant.

<sup>2</sup> Some 1,500 sea miles of particularly difficult waters, rendering the exercise of remote supervision impossible at that time.

<sup>3</sup> It was, of course, only *evidence* of it that was lacking for this period. The presumption that some activity in fact did take place was, in the circumstances, very strong.

<sup>4</sup> As regards the *Minquiers*, the same kind of gap did not occur because, apart from documentary evidence, there was practically no concrete evidence relating to that group in the Middle Ages. Such evidence did not start until after 1600 (see above, p. 53, end of footnote), but thereafter, even if slight and intermittent for a time, it was reasonably continuous.



(10) THE GEOGRAPHICAL FACTOR. CONTIGUITY. PROXIMITY TO OTHER TERRITORY<sup>1</sup>(a) *General considerations*

This matter was a good deal discussed in the *Minquiers* case. The Court itself founded no conclusion upon it, but two of the Judges who delivered separate Opinions made certain observations on the subject. It was at no time suggested in the case that the geographical proximity of disputed territory to other territory indubitably under the sovereignty of a claimant State is or can ever in itself be an actual ground or basis of title.<sup>2</sup> But it may have indirect effects. Thus, in the absence of anything to the contrary, it may lend colour to a contention that the disputed territory is in fact under the same sovereignty as the neighbouring or contiguous territory, or that State authority known to be exercised in the latter territory has been exercised in the former too. In short, contiguity or proximity is not a *ground* of title, but may in certain circumstances afford some evidence of its existence. It was from this point of view that the matter was discussed in the *Minquiers* case. As each of the disputed groups was situated roughly mid-way between Jersey and France, both sides were able to plead 'proximity'<sup>3</sup>—the fact that each group was situated somewhat closer to Jersey, being off-set by what could be regarded as the greater 'pull' of the French mainland coast. Each side, therefore, maintained that the groups constituted a 'natural unity' with its own territory, so that its authority must be deemed to exist there. Equally, both sides prayed proximity in aid of certain presumptions—

<sup>1</sup> For a thorough-going discussion of the whole subject see Waldock, loc. cit., pp. 337 ff.

<sup>2</sup> *Contiguity or proximity not a ground of title.* This is so as a matter both of principle and of precedent. Since international law now postulates the effective exercise of State functions as the basic requirement of title (see subsection (3) above), it would be wholly inconsistent with this position if the mere fact of proximity could confer title. The real basis of claims founded on proximity is sentimental, economic or political, as the case may be, but not legal. The whole idea was decisively rejected in the *Island of Palmas* case, when Judge Huber said (Report in *American Journal of International Law*, 22 (1928), at p. 893):

'... it is impossible to show the existence of a rule of positive international law to the effect that islands ... should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). ... The principle of contiguity ... as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State ... would be in conflict with what has been said as to territorial sovereignty ... [over] a region, and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it ... would ... lead to arbitrary results.'

And again (at p. 910):

'The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.'

The only cases that might lend the slightest colour to the geographical basis of title are the *Bulama* and *Island of Aves* cases (*Moore's International Arbitrations*, 1898, p. 1909; Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. ii (1923), p. 404). But in neither was contiguity or proximity the actual *ratio decidendi*, and the latter decision has been severely criticized on legal grounds.

<sup>3</sup> Certain geological factors were also adduced as relevant to the greater or lesser connexion of the groups with the French mainland, or with the other Channel Islands.



for instance, that after the separation of continental Normandy from the main Channel Islands in 1204, the disputed groups 'remained' with France, or went with the Channel Islands, as the case might be. These rival contentions not unnaturally tended to cancel each other out, but they nevertheless played a part, and one on the whole more favourable to the United Kingdom than to the French case. On the question of presumptions it has been seen (subsection (2) above) that the Court refused to found any conclusion on these. Nevertheless (*ibid.*) it came very near to accepting the United Kingdom contention that the Channel Islands were to be regarded as a physical entity distinct from continental Normandy, and one that comprised the Minquiers and the Ecréhos. Judge Basdevant also took account of the factor of proximity, though not on 'entity' grounds. Discussing the probability that the King of England, being clearly established in the main Channel Islands, and having superior naval power, was also in a position to exercise effective authority in respect of the Minquiers and the Ecréhos, Judge Basdevant said (*I.C.J.*, 1953, p. 78):

'Sans faire intervenir ici la notion d'archipel qui ne répond pas à la situation géographique,<sup>1</sup> la proximité de ces îlots par rapport à Jersey vient à l'appui de cette vraisemblance. Il semble donc qu'au sens du traité de 1360, les îlots litigieux étaient alors tenus par le roi d'Angleterre et qu'ainsi était remplie la condition posée par ce traité pour qu'ils lui fussent reconnus dans le partage.'

Therefore, but for certain other factors, Judge Basdevant would have been willing, on account (*inter alia*) of the proximity element, to hold that under the clause in the Treaty of Brétigny by which it was provided that each side should retain the islands it then 'held', France must be deemed to have recognized or agreed to English sovereignty over the Minquiers and the Ecréhos.

(b) *The question of 'entity' or 'natural unity'*

This question can have far-reaching consequences. Not only may it powerfully affect the play of probabilities and presumptions, but also, if it can be shown that the disputed areas (whether by reason of actual contiguity or of proximity) are part of an entity or unity over which *as a whole* the claimant State has sovereignty, this may (under certain conditions and within certain limits) render it unnecessary—or modify the extent to which it will be necessary—to adduce specific evidence of State activity in relation to the disputed areas as *such*—provided that such activity, amounting to effective occupation and possession, can be shown in respect of the entity as a whole. Such a position would seem to result from the principle

<sup>1</sup> Judge Basdevant's point here was that the Channel Islands, including the Minquiers and the Ecréhos, were too scattered *inter se*, and some were too close to the French mainland, for the whole to constitute a true archipelago.

established by the *Island of Palmas* case that 'sovereignty cannot be exercised in fact at every moment on every point of a territory'. But a careful use of language is required here. As Professor Waldock has pointed out,<sup>1</sup> it is 'only within the principle of effective occupation' that international law takes account of contiguity. 'Within that principle', he says,<sup>2</sup>

'... proximity may, in certain circumstances, operate to raise a presumption of fact that a particular state is exercising or displaying sovereignty over outlying territory in which there is no noticeable impact of its state activity.'

In short, contiguity or proximity is not itself occupation, or a substitute for it; but it may constitute presumptive evidence that there is occupation in fact. The balance may be a fine one. When Judge Huber in the *Palmas* case said:<sup>3</sup> 'It is possible that a group [of islands] may under certain circumstances be regarded as in law a unit, and that the fate of the principal may involve the rest', he at once went on to qualify this by distinguishing between the act of first taking possession (where the occupation of the main island of a group might be regarded as extending to the whole group), and its *maintenance*, which, he said, 'must make itself felt through the whole territory'.<sup>4</sup> Again, in the *Eastern Greenland* case, the Permanent Court rejected the Norwegian contention that although Denmark might have exercised sovereignty over some part of Greenland, this did not extend to eastern Greenland—but, as Professor Waldock points out,<sup>5</sup> this rejection was not based on the mere fact that eastern Greenland was 'a continuation of other territory possessed by Denmark', nor 'merely because Greenland, being an island, is a geographical unity'.<sup>6</sup> It was because Denmark had asserted, and had, as the Court found, displayed at least some State activity in regard to Greenland *as a whole*, that in the Court's view the onus lay on Norway to show that, in the circumstances, this activity had not extended to, and did not include, the eastern part of Greenland. In other words, contiguity did not confer upon Denmark a merely *constructive* or notional possession: the possession was actual, but presumed—yet presumable only because of the display of State activity in relation to the territory or region as a whole, and because, as Professor Waldock says:<sup>7</sup>

'The proximity, by raising a presumption of an actual intention and ability to control the outlying areas, operates to give the claimant [State] the benefit of the rule that an effective occupation need not make an impact in every nook and cranny of the territory.'<sup>8</sup>

<sup>1</sup> Loc. cit. (see above, p. 48, n. 1), p. 344.

<sup>2</sup> Ibid.

<sup>3</sup> See Report in *American Journal of International Law*, 22 (1928), at p. 894.

<sup>4</sup> Ibid.

<sup>5</sup> Loc. cit., pp. 343-4.

<sup>6</sup> On such a basis, an 'island' like Australia would be (as indeed it is) a geographical unity; but it can hardly be supposed that an occupation of one part of that country could *per se* have given rights over the whole continent.

<sup>7</sup> Loc. cit., p. 345.

<sup>8</sup> But, as Professor Waldock adds, this is only a presumption, liable to be rebutted by evidence of actual occupation or activity by another State.



It is in the same sense, it would seem, that the finding of the Arbitrator in the *British Guiana Boundary* case<sup>1</sup> must be understood, namely that

‘the effective possession of part of a region . . . may be held to confer a right to the . . . sovereignty of the whole of a region which constitutes *a simple organic whole*’—(italics added).

The foregoing considerations certainly played their part in the *Minquiers* case, even if only implicitly. It gradually became apparent that the disputed groups were part of an entity (the Channel Islands) over which *as a whole* English sovereignty had indisputably (and undisputedly) existed for centuries. As Judge Levi Carneiro said (*I.C.J.*, 1953, p. 102):

‘. . . the Minquiers and the Ecrehos are closer to Jersey than the mainland. They must be regarded as attached to Jersey rather than to the mainland. These islets were, and continue to be, part of its “natural unity”. It is for this reason that they remained English under the archipelago itself.’

And then (*ibid.*):

‘It seems inconceivable . . . that England, having an important interest in the Channel Islands, and full domination over the sea, and possessing all the principal islands, should not, without special reason, have conquered and retained the Ecrehos and the Minquiers, or rather, that she should have left them to France.’

There could scarcely be a clearer illustration of the principle that sovereignty, once shown to exist in respect of an entity or natural unity *as a whole*, may be deemed, *in the absence of any evidence to the contrary*, to extend to all parts of that entity or unity.

#### (II) MISCELLANEOUS FACTORS. THE QUESTION OF REPUTE. CONDUCT OF THE PARTIES

Both sides in the *Minquiers* case adduced evidence tending to show what was the view taken on the question of sovereignty by what might be called non-official but professional opinion—geographers, scientists, publishers of standard atlases, well-known authors, the evidence of maps, &c. Such considerations can never be conclusive.<sup>2</sup> But they may furnish important evidence of general opinion or repute as to the existence of a certain state of fact, and *pro tanto*, therefore, may support the conclusion that that state of fact does actually exist. As Judge Levi Carneiro said, speaking of the evidence of maps (*I.C.J.*, 1953, p. 105):

‘It may . . . constitute proof that the occupation or exercise of sovereignty was well known.’

<sup>1</sup> *British and Foreign State Papers*, vol. 99 (1904), p. 930.

<sup>2</sup> While Judge Huber in the *Palmas* case (*loc. cit.*, p. 891) referred to maps as ‘methods of indirect proof, not of the exercise of sovereignty, but of its existence in law . . .’, he added: ‘If the arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.’



The same Judge (*I.C.J.*, 1953, at pp. 87 and 88, and 108) also noticed evidence drawn from the works of well-known French authors, such as Victor Hugo's *Travailleurs de la Mer*, and the geographer Elisée Reclus's *Nouvelle Géographie Universelle*. The Court itself founded no conclusions upon these considerations, but they nevertheless played their part in the case, as did the evidence of the convictions of the parties themselves and their nationals, to be inferred from their general conduct and behaviour. It was unlikely that Jersey men would for decades have built houses on the Minquiers and the Ecréhos if they had not believed, and had not thought they had good grounds for believing, that these groups were dependencies of Jersey, and under the same sovereignty as that island. If the Court founded no conclusion on the fact, it cannot fail to have been impressed by the far greater interest in the groups taken, almost at all times, by the inhabitants and authorities of Jersey, as compared with those of France. A considerable part of the oral argument advanced on behalf of the United Kingdom was concerned with this aspect of the case.

## II. MISCELLANEOUS POINTS OF SUBSTANTIVE LAW, 1951-4

### § 1. DIPLOMATIC IMMUNITY

In the last phase of the *Asylum* case (Consequential Points), the Court, after reaffirming the principle laid down in its previous main Judgment in that case, to the effect that the 'safety which arises out of [diplomatic] asylum cannot be construed as a protection against the regular application of the laws, and against the jurisdiction of legally constituted tribunals',<sup>1</sup> went on also to reaffirm the principle, equally recognized in that Judgment, that diplomatic agents are in fact subject to local law, despite their diplomatic status. Failing this, as the Court said (*I.C.J.*, 1951, p. 81), diplomatic protection

'would authorize the diplomatic agent to obstruct the application of the laws of the country, *whereas it is his duty to respect them*'—(italics added).<sup>2</sup>

In short, a diplomatic agent is only immune from jurisdiction or process, i.e. from the direct *consequences* of any violation of local law, not from the applicability of that law to him in principle, or from the legal obligation to

<sup>1</sup> Thus indicating the general limits to which the principle of diplomatic asylum is subject. It may be recalled (see this *Year Book*, 27 (1950), pp. 34-35) that, as formulated by the Court in its main Judgment in the *Asylum* case (*Peru v. Colombia*), this principle involves affording protection not to political offenders as such, but to persons in danger of mob violence or of *arbitrary* measures at the hands of the local authorities, whatever the character of the accusation (though it may be very likely *in practice* to be political).

<sup>2</sup> From this pronouncement support can also be derived for the view that diplomatic extra-territoriality is a fiction and not the real basis of diplomatic immunity, which is rather to be found in the practical requirements of the diplomatic function.

conform to it, or from fundamental legal liability. In the same way, it is not the case that the inhabitants of the country have *no* civil law rights against a diplomatic agent: it is simply that they cannot enforce those rights against him, or at any rate cannot do so by the process of the local courts. There may, however, be other means of recourse. Thus, a diplomatic agent can, even during his term of office, be sued in his own country in respect of something done in the country of the diplomatic residence—so far as the process of the courts of his own country will allow. At any rate, his diplomatic status would not normally, as such, afford him any protection there. Again, as is well known, the legal *liability* of a diplomatic agent, and his subjection in principle to the local law, have the consequence that, since the immunity from *process* comes to an end with the termination of the diplomatic mission, proceedings can then be taken against the agent in the local courts, even though the act or transaction with which the proceedings are concerned occurred at a time when immunity still existed.<sup>1</sup>

## § 2. DIPLOMATIC ASYLUM. IMPROPER OR IRREGULAR GRANT. LIMITS ON THE DUTY OF THE GRANTING MISSION TO ASSIST THE LOCAL AUTHORITIES

As already indicated (in footnote 1 on p. 76 above), the Court, in its main Judgment in the *Asylum* case, did not accede to the view that there was any general right to grant diplomatic asylum to persons accused of political offences as such, when there was no evidence that the refugee was in danger of mob violence or of extra-legal or other arbitrary action at the hands of the local authorities.<sup>2</sup> For this reason (*inter alia*)—and notwithstanding that the refugee in that case was a political offender—the Court pronounced the grant of asylum to be improper and irregular, and ordered it to be brought to an end. The Court did not, however, indicate what steps should or must be taken to achieve this result, and this led to the further (consequential) proceedings, in which the issue was, in effect, whether the State whose Embassy in the country concerned was affording the asylum, had become bound by reason of the Judgment of the Court to effect an actual *surrender* of the refugee to the local authorities, or whether it could discharge its obligation to terminate the asylum by using some other method—(e.g. by a simple ejection of the refugee from the Embassy

<sup>1</sup> The reality of the existence of legal liability can manifest itself indirectly in a number of different ways. For instance, in *Rekstin v. Severo Sibirsko Gosudarstvennoe*, [1933] 1 K.B. 47, it was held that diplomatic immunity could not be invoked to avoid a garnishee order. Similarly, an owner of property who, without being able to take legal proceedings against a diplomatic agent, none the less succeeded in regaining peaceful possession of chattels unlawfully detained by the agent, would be justified in retaining them, and would not be liable in any suit for recovery of them on the part of the diplomatic agent.

<sup>2</sup> This was reaffirmed in the later (consequential) proceedings, where the Court said (*I.C.J.*, 1951, p. 81) that it could not admit 'a legal system which would guarantee to . . . nationals accused of political offences the privilege of evading national jurisdiction'.



premises).<sup>1</sup> The Court pronounced itself in favour of the latter view, but at the same time refused to indicate any particular method of terminating the asylum as being the one which should be employed in the circumstances. In effect, this was to be left to the parties. After stating (*loc. cit.*) that 'it would be an entirely different thing to say that the State granting an irregular asylum is obliged to surrender the refugee to the local authorities', and that 'Such an obligation *to render positive assistance to these authorities* [*italics added*] in their prosecution of a political refugee would far exceed the above-mentioned findings of the Court'<sup>2</sup> (*vide supra* in this and the preceding section), the Court went on to deal with the conflict or paradox arising from the two principles (*a*) that the refugee's status as a political offender did not, in the circumstances,<sup>3</sup> justify the grant of diplomatic asylum, but (*b*) the existence of this status precluded his *surrender*, or at any rate justified its refusal. After referring to its previous main decision that the grant of asylum was, in the circumstances, illegal, the Court went on to say (*I.C.J.*, 1951, p. 82):

'This decision entails a legal consequence, namely that of putting an end to an illegal situation; the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the Government of Peru is legally entitled to claim that it should cease.

'But the latter Government adds in its Submission a demand that the asylum should cease "in order that Peruvian justice may resume its normal course which has been suspended". This addition appears to involve, indirectly, a claim for the surrender of the refugee. For the reasons given above, this part of the Submission of the Government of Peru cannot be accepted.

'The Court has thus arrived at the conclusion that the asylum must cease, but that the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities. *There is no contradiction between these two findings, since surrender is not the only way of terminating asylum*'—(*italics added*).

The Court therefore left the ultimate solution to the parties; but would seem in fact to have done all it was called upon to do in the circumstances, since there is no necessary conflict between the absence of an obligation to surrender (or even the presence of a positive duty not to) and the existence of an obligation to terminate the asylum (by other means).<sup>4</sup>

<sup>1</sup> There is in fact a considerable practical as well as legal difference between an obligation to *surrender* the refugee, and a mere obligation to terminate the asylum. It would not be difficult to carry out the latter duty in such a way that the refugee would be unlikely to fall into the hands of the local authorities, or would at any rate have a reasonable chance of not doing so. Equally, matters could be so arranged that the ejection of the refugee was equivalent to his surrender.

<sup>2</sup> Although, in form, this view was based on the interpretation of a relevant treaty—the Havana Convention on Asylum of 1928—the reasoning seems to be applicable generally to any case in which, owing to a local custom of granting diplomatic asylum, the right to do so exists independently of treaty.

<sup>3</sup> Because, in the given case, the Court did not feel that any humanitarian considerations were involved, arising from a threat of mob violence or of arbitrary measures.

<sup>4</sup> It seems doubtful whether two equally valid rights can ever be in conflict *juridically*, for in



§ 3. DOMESTIC JURISDICTION<sup>1</sup>

Indirectly, the finding of the Court on the question of interim measures in the *Anglo-Iranian Oil Co.* case (Interim Measures) has a bearing on the subject of domestic jurisdiction. The immediate issue was whether certain action, *prima facie* of a purely domestic character, taken by a Government, within its territory, but involving a foreign company, had a sufficient element of the international to warrant a preliminary and provisional exercise of jurisdiction on the part of the Court. The Court found that a Government had adopted the cause of one of its national companies and was 'proceeding by virtue of the right of diplomatic protection'. The Court also found that the complaint was one of 'an alleged violation of international law by the breach of [a concessionary] agreement . . . and by a denial of justice which according to the [same] Government, would follow from the refusal of the [other] Government to accept arbitration in accordance with that agreement. . . .' The Court then found (*I.C.J.*, 1951, pp. 92-93) that

'it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction'.

While the Court found that, on this basis, it had jurisdiction to entertain a request for interim measures of protection, it was careful to state that the indication of such measures by it would in no way prejudice the question of the jurisdiction of the Court to deal with the *merits* of the case, or the right of the parties to submit argument on the question of such jurisdiction—and in fact the Court, in subsequent proceedings, eventually found that it had no jurisdiction to entertain the main claim in the case. The pronouncement above quoted cannot therefore be read as constituting authority for the view that the mere *invocation* of the right of diplomatic protection, or the mere allegation of a denial of justice to a foreigner, or of a breach of international law by the violation of an agreement, will of itself cause the case to be 'not outside' the scope of international jurisdiction, and therefore not to be a case falling within the domestic jurisdiction exception.

(i) To say that it cannot be accepted *a priori* that a certain claim 'falls completely outside the scope of international jurisdiction' does not assert

that case one of them would not be juridically valid—or would be juridically subordinate. They may, however, be in conflict in the sphere of fact—but the conflict is then capable of a factual solution. Thus the right of a belligerent to prevent the carriage of contraband is in conflict *factually* with the equal right (juridically) of the neutral merchant or shipowner to send or carry it. This conflict is resolved in the sphere of fact by the belligerent intercepting the contraband if it can (in which case the neutral has no ground for complaint), and the neutral getting it through if he can (in which case the belligerent will equally have no legal ground of complaint).

<sup>1</sup> For the Court's previous findings on this question, in the period 1946-51, see this *Year Book*, 29 (1952), pp. 34-37.

more than that it is not clear that the matter is not one of international jurisdiction. This, however, does not amount to a final decision that it is such a matter.<sup>1</sup>

(ii) The case must be related to the pronouncement of the Permanent Court of International Justice in the *Tunis and Morocco Nationality Decrees* case (Series B, No. 4, p. 26), where it was expressly laid down that the mere invocation of international law or allegation of a breach of international law was not sufficient *eo ipso* to cause the issue to be one of international and not domestic jurisdiction. At the same time it was stated that 'once it appears that the legal grounds . . . relied on are such as to justify the *provisional* conclusion [*italics added*] that they are of [*sc.* international] juridical importance . . . the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law'.

In point of fact there can be no doubt that where issues of international law (such as denial of justice, the diplomatic protection of citizens abroad, &c.) are genuinely involved, or where an agreement is in question which is in fact an *international* agreement, the issue must be one of international jurisdiction and cannot be one merely of domestic jurisdiction.<sup>2</sup> But that the issues are of this kind is something that has to be established—as it had to be in the *Nationality Decrees* case. The question of domestic jurisdiction or not domestic jurisdiction is, in short, to a considerable extent a matter of judicial appreciation. In some interesting passages on the subject of the *domaine réservé*, Judge Alvarez pointed out in the *Anglo-Iranian Oil Co.* case (*I.C.J.*, 1952, p. 128) that the concept of *abuse of rights*<sup>3</sup> might cause certain elements of a matter, itself indubitably one of domestic jurisdiction, to assume an international character. In the same way (*ibid.*) he thought that so obviously 'domestic' a matter as a State's internal organization might have an international aspect, for

'although . . . every State may establish the internal organization which it chooses, this organization must nevertheless be such that the State can fulfil its international obligations; if the State does not do so . . . and . . . if by reason of defects in its internal organization it causes injury to another State, it is under an obligation to compensate that State'.

This is true. Nevertheless, it would remain the case that what would be the subject of international jurisdiction in such a situation would be the eventual failure of the State to carry out its international obligations, and the injury thereby caused to another State, rather than the defects in internal organization that had led to these consequences. What international

<sup>1</sup> Issues of domestic jurisdiction were in fact argued in the main proceedings that took place subsequently, but the Court based its decision on another point and did not pronounce on this question.

<sup>2</sup> See this *Year Book*, 29 (1952), pp. 35–36.

<sup>3</sup> *Ibid.*, 27 (1950), pp. 12–14, and 30 (1953), pp. 53–54.



jurisdiction takes cognizance of is the actual failure to comply with international law, not the domestic circumstances that have caused it.<sup>1</sup>

#### § 4. DENIAL OF JUSTICE.<sup>2</sup> RIGHT OF ACCESS TO THE COURTS

In the *Ambatielos* case (Second Phase), the issue was whether a claim, fundamentally one of treatment of foreigners, could be said to be 'based' on the provisions of a certain commercial treaty so as to attract the compulsory arbitration provision of that treaty. The majority of the Court found that the fact that one of the parties invoked certain clauses of the treaty as having a bearing on its claim, while the other denied that they had any such bearing, constituted a difference between the parties as to the interpretation and effect of these clauses sufficient to warrant recourse to the arbitral tribunal, and that the dispute must accordingly be referred to it. In taking this line, the Court did not treat the question whether the claim was 'based' on the treaty as being a substantive issue, and it did not therefore go into the merits of that question or express any view upon it.<sup>2</sup> On the other hand, the dissenting Judges (McNair, Basdevant, Klaestad and Read), delivering a joint Opinion, considered that the real plea was one of denial of justice,<sup>3</sup> and that this was essentially a claim arising under, and founded on, general international law, and was not a matter of commercial treaty rights<sup>4</sup> (*I.C.J.*, 1953, p. 34):

'In fact when the Hellenic Government complains that the executive or judicial authorities of the United Kingdom have not acted according to the requirements of the proper administration of justice, it is alleging a violation of general international law.' In reaching this conclusion, the four minority Judges gave an interesting exposition (*ibid.*, p. 33) of what is involved in the conception of freedom of access to the courts for foreigners on the same basis as nationals.<sup>5</sup>

<sup>1</sup> The case could equally be classified as one of the supremacy of international over municipal law, and as an example of the principle that a State cannot invoke its domestic law or constitution as a ground justifying failure to perform its international obligations—see this *Year Book*, 30 (1953), pp. 26-27.

<sup>2</sup> This matter is only referred to here. It has considerable ramifications and will be discussed more fully in a subsequent article.

<sup>3</sup> The present writer understands the term 'denial of justice' as involving not merely such a denial on the part of the courts themselves, but also a denial resulting from the wrongful acts of the executive authorities in the course of legal proceedings, or in relation to the administration of justice. For a general discussion of the problem of terminology involved, see the writer's article, 'The Meaning of the Term "Denial of Justice"', in this *Year Book*, 13 (1932), especially pp. 102-5, and the conclusion on the latter page; and Freeman, *The International Responsibility of States for Denial of Justice*, chapters v-vii.

<sup>4</sup> Holding this view, the minority Judges found that the claim could not be said to be 'based' on the commercial treaty in question, however much one of the parties might *invoke* its clauses. In their opinion, the attempt to import general international law into the treaty through the medium of its most-favoured-nation clauses must fail, because these only related to commerce and navigation; while the only clause in the treaty which specifically dealt with the subject of the administration of justice, namely, the 'free access' clause, did not cover the plaintiff's case since he had been afforded access to the courts. It was his treatment in the proceedings before the courts, not his exclusion from the courts, that was in issue.

<sup>5</sup> Although this was with reference to a treaty provision, the point involved is essentially a



'This Article<sup>1</sup> promises free access to the Courts; it says nothing with regard to the production of evidence.<sup>2</sup> Questions as to the production of evidence are by their nature within the province of the law of the Court dealing with the case (*lex fori*). The Treaty could have laid down certain requirements in this connection, but it did not do so. The free access clause frequently found in treaties, more commonly in the past than at the present, has as its purpose the removal, for its beneficiaries, of the obstructions which existed in certain countries as a result of old traditions to the right of foreigners to have recourse to the Courts. Its object is, as it states, to ensure free access to the Courts, not to regulate the different question of the production of evidence. An extensive interpretation of the free access clause which would have the effect of including in it the requirements of the proper administration of justice, in particular with regard to the production of evidence,<sup>3</sup> would go beyond the words and the purpose of Article XV, paragraph 3. Free access to the Courts is one thing; the proper administration of justice is another.'

After quoting authority for these propositions<sup>4</sup> and pointing out that the compulsory arbitration clause of the Treaty could only properly be regarded as applying to matters that came within the scope of the provisions of the Treaty, the minority Opinion went on (*loc. cit.*, p. 34):

'The free access clause does not do more than provide for free access and for national treatment as regards conditions, restrictions, taxes and the employment of counsel. The complaint as put before the Court in this case, does not allege that Mr. Ambatielos was refused access to the English Courts, or that he was denied national treatment as regards conditions, restrictions, taxes or the employment of counsel. The Hellenic Government merely alleges that the production of evidence was effected in a manner which, in its opinion, was defective and detrimental to its national. Article XV, paragraph 3, is unconnected with this complaint. If any legal rule has been broken, it is not a rule contained in this Article.'

general one. It arises on a general international law footing and not exclusively as a matter of treaty interpretation. °

<sup>1</sup> The relevant part of the Article read: 'The subjects of each of the two High Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ . . . advocates, attorneys, or agents. . . .'

<sup>2</sup> The plaintiff's grievance was not that he had not been allowed to bring his case (which was against a government department), but that, as he alleged, the department concerned had withheld vital evidence; and further (as he also alleged when the matter was before the International Court), that the Court of first instance had decided against the weight of the evidence, and that on appeal the Court of Appeal had improperly refused to allow the plaintiff to call further evidence. Clearly, these allegations had nothing to do with access—indeed, their very existence postulated that access had in fact been granted.

<sup>3</sup> The claimant Government sought to avoid this difficulty by propounding a constructive refusal of access: access, even if initially afforded, would be stultified, and so to speak cancelled out, if followed by a refusal or failure to allow the litigant the means to present his case.

<sup>4</sup> The minority Opinion said that 'A distinction is traditionally drawn between the two as is shown, in particular, by the preparatory work of the 1930 Conference for the Codification of International Law' (see in particular the Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law, League of Nations, C.196. M.70. 1927. V, pp. 96–100 and 104; Observations of the Hellenic Government on this Report, pp. 167–168, and Bases of Discussion Nos. 5 and 6 by the Preparatory Committee, League of Nations, C.75. M.69. 1929. V, vol. iii, pp. 48 and 51).

This question came up again in the third and final phase of the *Ambatielos* case, which it is permissible to refer to here for the sake of completeness, although it did not take place before the International Court but before an Anglo-Greek Commission of Arbitration<sup>1</sup> set up by the parties in consequence of the International Court's finding in the second phase of the case (see the opening of the present section). The Commission of Arbitration took a view which, in the first place, confined the notion of free access to a right to receive *national* treatment in that matter (Award, p. 54):<sup>2</sup>

'The modern concept of "free access to the Courts" represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of "free access" is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the Courts of the land for the protection and defence of their rights.'

Within the confines of national treatment, on the other hand, the Commission took a fairly liberal view of what was comprised by the notion of access to the courts, holding it to involve (*ibid.*, p. 53)

'... that the foreigner shall enjoy full freedom to appear before the Courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law; to deliver any pleading by way of defence, set off or counter claim; to engage Counsel; to adduce evidence whether documentary or oral or of any other kind; to apply for bail; to lodge appeals<sup>3</sup> and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.'

On the whole, this pronouncement, while not in all respects easy to reconcile with the four-Judge finding before the International Court, does not appear to carry the notion of free access beyond its legitimate sphere of the right to appear, and to present and argue a case. There is a danger that, if the idea is too widely interpreted, the distinction between access as such, and treatment before the courts after access, will become blurred and obliterated. Refusal of access is only one head of denial of justice, and is not co-extensive with the entire field of that concept,<sup>4</sup> or the part would be equivalent to the whole. A given action by a Government, its courts or its executive authorities in connexion with the administration of justice, may amount to or involve a denial of justice, and hence be a breach of

<sup>1</sup> The Commission was set up under an Anglo-Greek *Compromis d'Arbitrage* dated 24 February 1955, and was composed of Dr. Ricardo J. Alfaro (Panama—President); Judge Algot Bagge (Sweden); Professor Maurice Bourquin (Belgium); Professor Jean Spiropoulos (Greece); and Gerald Thesiger, Esq., Q.C. (United Kingdom). It gave its award on 6 March 1956.

<sup>2</sup> The references, pending printing and publication, are to the original cyclostyled version.

<sup>3</sup> I.e., presumably, free access to courts of appeal in any case in which the local law gives a right of appeal.

<sup>4</sup> For the definition of the concept of denial of justice as understood by the present writer, see above, p. 81, n. 3.



international law; but it may very well not consist in a denial of *access* to the courts, and in that case it will not involve any breach of a treaty clause providing for free access. This was the essential point made in the four-Judge Opinion before the International Court in the second phase of the *Ambatielos* case (as cited above). Of its correctness in principle, it is hardly possible to doubt.

### § 5. MOST-FAVOURLED-NATION RIGHTS<sup>1</sup>

#### (a) *Scope of the rights*

While there may be room for argument as to what exactly is covered by any particular most-favoured-nation clause, there can be no doubt in principle that clauses conferring most-favoured-nation rights can (through the operation of a specific grant to another country) only attract rights of the same kind or order, or belonging to the same class, as those contemplated by the most-favoured-nation clause concerned. The subject-matter or category of subject-matter must be the same: the grant of most-favoured-nation rights on one subject, or order of subjects, cannot confer a right to enjoy the treatment granted to another country in respect of a different subject-matter or category of subject-matter.<sup>2</sup> The Court seems to have given effect to this principle in the *Anglo-Iranian Oil* case (Jurisdiction). The issue there, so far as it concerned the most-favoured-nation question, was whether State *A* could claim a right to require State *B* to submit a dispute to international adjudication—i.e. a jurisdictional right—on the basis (i) of a general grant of most-favoured-nation rights by *B* to *A*, coupled with (ii) the grant by *B* to State *C* of a right to treatment in accordance with the principles and practice of ordinary international law<sup>3</sup>—State *C* being in fact in a position to require submission to compulsory adjudication on the part of State *B* of the same class of (international law) dispute as that in issue between *B* and *A*. It was argued by *A* that, in these circumstances, *A* would not be receiving the general most-favoured-nation treatment in international law matters to which it was entitled from *B*,

<sup>1</sup> Although most-favoured-nation rights are conferred through the agency of a treaty, the issues involved are matters of substantive rather than treaty law. For a discussion of some rather specialized points arising in connexion with the most-favoured-nation question in the *Morocco* case, see this *Year Book*, 30 (1953), pp. 59–62.

<sup>2</sup> An apt statement of this principle, cited before the Court in the *Ambatielos* case (see p. 402 of the I.C.J. Volume of Pleadings and Oral Arguments), was given by Visser in *Revue de droit international et de législation comparée*, 1902, at p. 81:

‘En ce qui concerne le contenu essentiel de la clause, il est clair que les droits qui en résultent s’étendent seulement aux intérêts dont on a convenu expressément.’

A similar view on the *principle* involved was taken by the Commission of Arbitration in the third phase of the *Ambatielos* case (see last part of § 4 above). The Commission said (Award, p. 42):

‘. . . the Commission holds that the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates’.

For the Commission’s application of this principle see the last part of the present subsection.

<sup>3</sup> As to this, see subsection (c) below.



unless *B* were equally obliged to submit its dispute with *A* to international adjudication.<sup>1</sup> The Court rejected this view (*I.C.J.*, 1952, p. 110):

'The Court need only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom had no relation whatever to jurisdictional matters between the two Governments.'

In effect, the Court found that there was not a sufficient connexion between the specific right claimed (namely, the submission of the dispute to compulsory adjudication) and the class of matter in respect of which the right to most-favoured-nation treatment had been granted (namely, treatment in accordance with the general principles and practice of international law).<sup>2</sup> In the *Ambatielos* case (Second Phase) the Court took a view which made it unnecessary for it to pronounce on this point, but the four-Judge minority (McNair, Basdevant, Klaestad and Read) expressed a view precisely similar to that which the Court itself had expressed in the *Anglo-Iranian Oil* case. They said (*I.C.J.*, 1953, p. 34):

'But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice. . . . The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate [i.e. the obligation to submit to arbitration] on an extensive interpretation of this clause.'<sup>3</sup>

In the third phase of the *Ambatielos* case, the Commission of Arbitration, while, as has been seen (above, p. 84, n. 2), agreeing as to the principle that a most-favoured-nation clause could only attract rights in the same category as the subject-matter of the clause itself, differed somewhat from the four-Judge Opinion as to what might be attracted by a most-favoured-nation clause on 'commerce and navigation'. Up to a point, the Commission took the same view, and thought (Award, p. 43<sup>4</sup>) that '“the administration

<sup>1</sup> The underlying point was that Iran had only accepted the compulsory jurisdiction of the Court in respect of treaties concluded by Iran subsequent to the date of her acceptance. Having no relevant treaty with Iran concluded subsequent to that date, the United Kingdom sought to rely on certain treaties so concluded by Iran with other countries (e.g. Denmark), the provisions of which the United Kingdom claimed to be entitled to benefit from by reason of the most-favoured-nation provisions of its own, earlier, treaties with Iran.

<sup>2</sup> Judges McNair and Hackworth, in their separate (and, in the case of the latter, dissenting) Opinions, expressed a similar view on this point (see *ibid.*, pp. 122 and 139).

<sup>3</sup> The view expressed in this last sentence is of great importance. The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to cause provisions not in themselves subject to an obligation of compulsory arbitration in the event of a dispute, to become so by reason of their attraction by and notional incorporation into another treaty that does contain such a clause. States may thus find themselves obliged to arbitrate cases they had never contemplated submitting (and would not normally have agreed to submit) to arbitration.

<sup>4</sup> See above, p. 83, n. 2.

of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation" ', but then went on to say (*ibid.*) '... but this is not necessarily so when it is viewed in connection with the protection of the rights of traders'. The Commission then went on to find that, in view of certain general phrases in Article X of the Treaty concerned<sup>1</sup>—('all matters relating to commerce and navigation . . . it being [the] intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most-favoured nation')—it would be legitimate in this case to regard the notion of commerce and navigation as extending to the administration of justice 'in so far as it is concerned with the protection of these rights', i.e. the rights of traders. This view opens up a wide field of speculation, since it must lead to some unusual results—for instance, on that basis, it would have to be supposed that the parties to the treaty intended to place the legal protection of commercial rights on a superior and privileged footing as compared with the protection of non-commercial legal rights, even if this should involve differentiating in the quality of the administration of justice required in the one class of case as compared with the other. Actually, it is difficult to believe that Governments are ever likely to have such an intention, even when seeking benefits for their traders.<sup>2</sup>

(b) *The mechanics of the operation of the most-favoured-nation clause*

The most-favoured-nation process is essentially a double one, depending on the interplay of two sets of treaty provisions. It may become material in certain cases to determine which of these two sets is to be regarded as the basic one, in the sense of conferring the fundamental right, even though that right is inchoate or dependent for its active operation on the happening of a subsequent event.<sup>3</sup> Thus in the *Anglo-Iranian Oil* case, the issue turned in part on the necessity of invoking treaty rights arising after a certain date. Where, therefore, the enjoyment of these rights depended on the operation of a most-favoured-nation clause in a previous treaty, and that treaty was prior to the crucial date, while the specific right claimed *in consequence* of that antecedent treaty had arisen after the crucial date, the point referred to above arose. The Court said (*I.C.J.*, 1952, p. 109):

'But in order that the United Kingdom may enjoy the benefit of any treaty concluded

<sup>1</sup> This provision was as follows:

'The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured-nation.'

<sup>2</sup> The matter cannot appropriately be further discussed here, in an article devoted primarily to the work of the International Court of Justice.

<sup>3</sup> See this *Year Book*, 30 (1953), p. 61, and footnote 1 on that page.



by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the *basic* treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.'

Judge Hackworth, on the other hand, thought that for the purposes of the actual issue involved, the later treaties concluded by Iran with third States were the important ones (*I.C.J.* 1952, p. 137):

'The conclusion that the treaty containing the most-favoured-nation clause is the *basic* treaty upon which the United Kingdom must rely amounts, in my judgment, to placing the emphasis on the wrong treaty, and losing sight of the principal issue.'

After explaining that what the United Kingdom was complaining of was that its nationals in Iran had not been treated in accordance with the provisions of certain treaties concluded by Iran with third States after the crucial date, the benefit of which the United Kingdom claimed by the operation of a most-favoured-nation clause, Judge Hackworth went on (*ibid.*, p. 138):

'It is to these [third party] treaties and not to the most-favoured-nation clause that we must look in determining the rights of British nationals in Iran. These then are the *basic* treaties. The most-favoured-nation clause in the earlier treaties is merely the operative part of the treaty structure involved in this case. It is the instrumentality through which benefits under the later treaties are derived. It is in these later treaties that we find the *ratio decidendi* of the present issue.'

While Judge Hackworth's view may well have been justified in relation to the particular and rather special facts of the *Anglo-Iranian* case, there can be little doubt that the Court's was the correct view as a matter of general principle. The question being what treatment State *A* is entitled to from State *B*, State *A* must be in a position to invoke a treaty between itself and *B*—any other treaty would, as the Court said, be *res inter alios acta*. If the only relevant treaty between *A* and *B* is a most-favoured-nation one, then this must be the basic treaty, both because it is only by invoking it that *A* can claim the rights granted by *B* to a third State, and also because it is the only treaty that *A* can invoke directly against *B* at all. It is quite correct, as Judge Hackworth said, that the *specific treatment* to be accorded derives from the subsequent, third party, treaty. But it remains true, nevertheless, that the entire right to receive such treatment derives from and depends on the earlier most-favoured-nation treaty. The role of the later treaty is so to speak largely indicative. It does not *per se* confer rights on *A*, but (as between *A* and *B*) it indicates *what* particular treatment *B* must grant *A* by reason of the right given to *A* under the earlier most-favoured-nation



clause. If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round.

(c) *Most-favoured-nation clauses and treatment in accordance with general international law*

(i) It is a difficult question whether an ordinary most-favoured-nation clause, such as is to be found in the great majority of commercial treaties, is apt (i.e. can properly be used) to attract treatment in accordance with general principles of international law; and, further, whether a right to such treatment, even where it is apparently the subject of a specific grant, is ever truly in the nature of a 'privilege, favour or immunity', to be there-upon 'extended' to the party enjoying the most-favoured-nation rights—this being the wording employed by many most-favoured-nation clauses.<sup>1</sup> This question arose in both the *Anglo-Iranian Oil* and *Ambatielos* (Second Phase) cases, but in neither case did the Court pronounce upon it, since the actual ground of decision turned on another issue.<sup>2</sup> On the other hand, the Commission of Arbitration in the third phase of the *Ambatielos* case (see last part of § 4 above, and n. 1 on p. 83) did pronounce on the point, at any rate as regards the form in which the issue arose in that case (see subsection (vi) below).

(ii) The difficulty is twofold. First, *can* countries grant each other rights which they already possess by general operation of law, and would possess even without the purported grant—or rather, is such a transaction really a grant at all? What is a 'grant'? Properly understood, it is the transfer of, or the investing of the other party with, something not already possessed by that party. It is not possible to 'grant', still less to 'extend' to any party, rights which that party enjoys in any event. To parody the maxim *nemo dare potest quod non habet: nemo dare potest quod alienus jam*

<sup>1</sup> See above, p. 86, n. 1, for the text of a typical clause of this kind. It refers essentially to 'any privilege, favour or immunity . . . which either . . . Party has actually *granted* or may hereafter *grant* to the subjects or citizens of any other State . . . shall be *extended* . . . to the subjects or citizens of the other . . . Party'—(italics added). For another, less explicit, form, see below, p. 91, n. 1. But though less explicit, this form comes to the same thing, since any reference to 'the footing [or treatment] of the *most-favoured* nation' implies a position of privilege resulting from a grant of treatment that is the subject neither of any inherent right nor of universal enjoyment.

<sup>2</sup> In the *Anglo-Iranian* case, the Court said (*I.C.J.*, 1952, p. 109):

'It is contended by the United Kingdom that upon the coming into force of the Iranian-Danish Treaty on March 6th, 1935, Iran became bound, by the operation of the most-favoured-nation clause, to treat British nationals on her territory in accordance with the principles and practice of international law. Without considering the meaning and the scope of the most-favoured-nation clause, the Court confines itself to stating that this clause is contained in the Treaties of 1857 and 1903 between Iran and the United Kingdom, which are not subsequent to the ratification of the Iranian Declaration. While Iran is bound by her obligations under these Treaties as long as they are in force, the United Kingdom is not entitled to rely upon them for the purpose of establishing the jurisdiction of the Court, since they are excluded by the terms of the Declaration.'

*habet*. It follows that a purported grant of international law rights is really to be regarded (however it may be framed) as being a species of declaration or confirmation; and whatever its wording, the real juridical character of such a provision is declaratory rather than operative. Secondly, even assuming a grant, *can* a grant of something to which not only the grantee State, but every other State, is already entitled (because it is a right to treatment in accordance with international law), be a grant in the nature of a 'privilege, favour or immunity'? *Prima facie*, a most-favoured-nation clause between two countries contemplates (a) a grant of specific and particular rights by one of them to a third country, to which that country would not otherwise be entitled, and (b) that *thereupon* (but not otherwise) the other party to the most-favoured-nation clause shall become entitled to have 'extended' to it these same rights, to which, equally, it would not otherwise be entitled. As was stated by Visser (see above, p. 84, n. 2, and p. 403 of the I.C.J. Volume of Pleadings in the *Ambatielos* case):

'... la clause a l'intention de garantir à l'ayant droit des avantages dont celui-ci ne jouit pas en vertu de son propre droit ou de ses propres traités, mais qui ont été accordés à des tiers.

'... la clause ... comporte le droit d'être traité à l'égal des tiers; afin que le droit puisse entrer en vigueur, il est donc nécessaire que quelque *privilège* ait été accordé à un autre.'

This citation brings out the essential object of the most-favoured-nation clause, which is to prevent *discrimination*. But what can such a clause have to do in a field in which, *ex hypothesi*, there cannot legally be any discrimination? Clearly, none of this can be apt in relation to rights which—whether or not they have apparently been made the subject of a specific grant—are already possessed by all concerned, and would be so possessed even in the absence of any treaty provision, and which are consequently in no way dependent on such provisions or on the play of a most-favoured-nation clause in relation to them. In short, where general international law rights are concerned, or a right to treatment in accordance with the rules of international law, there are not, and cannot be, any 'most-favoured' nations. The very idea of a 'favoured' nation is alien to such rights.

(iii) For these reasons, there must at least be a strong presumption against the idea that the parties to a most-favoured-nation clause have thereby intended to attract rights in the nature of general international law rights which either of them might accord, or seem (theoretically) to accord, to another country. Equally, there must be a strong presumption that if two countries do appear to accord each other a right to general international law treatment, or some specific international law right, this will really be by way of declaration, interpretation, clarification or confirmation, and not strictly by way of actual grant. There is no doubt that countries do



occasionally, for special reasons, include in their treaties clauses about what are really general international law rights. It is conceivable, for instance, that a country which is alleged to have been infringing a recognized rule of international law may agree by treaty to refrain from doing so, or to pursue a different course of action. Or two countries may be in agreement about the existence of a certain rule, but may have interpreted it in different senses, and may by treaty place an agreed interpretation on record. Or they may confirm the existence of a certain rule as governing their mutual relations, or may even give each other assurances that treatment in accordance with a given rule or rules of international law, or in accordance with international law generally, will in fact be forthcoming. But properly understood, do any of these things amount to more than a recognition that certain rules and rights exist, and an assurance that they will be observed and honoured? They are not a grant of the rights themselves; and if they are not, they cannot be attracted by a most-favoured-nation clause—certainly not by that type of clause that contemplates a grant of rights, and a grant by way of privilege or favour; nor, indeed, even by a differently worded clause, so long as it contains the term ‘most-favoured-nation’—for the very notion of a favour excludes the kind of right in respect of which, by the nature of the case (i.e. that it is a general international law right), there cannot be a ‘*most-favoured*’ nation, and no country can claim any special privilege, favour or immunity.

(iv) Despite these very cogent considerations, the correctness of which in principle can hardly be open to doubt, States have tried to make use of, and have invoked, most-favoured-nation clauses in one treaty, in order to attract provisions in other treaties said to involve a grant of rights, or of treatment, under the general rules of international law—although, so far, the attempt has not been successful. It is clear that this process must always have an ulterior object. The very fact that the country seeking to make use of it already has a right to the treatment in question (under general international law itself) means that it does not need to employ this circuitous method in order to claim the enjoyment of the actual substantive rights involved—for it can claim these directly under general international law. The object, therefore, is not to claim them simply as international law rights, but (or also) as *treaty* rights—and the purpose of that is almost always a jurisdictional one, i.e. the tribunal whose jurisdiction is invoked has jurisdiction only on the basis of a certain treaty, or if a certain treaty position exists; or alternatively the only dispute that can, in the particular circumstances, be submitted to the tribunal is whether there has been a breach of a certain treaty—not whether there has been a breach of general international law. Thus, in the *Anglo-Iranian Oil* case, the United Kingdom did not need to invoke any treaties merely in order to claim its international



law rights as against Iran. But it did need to do so in order to obtain an adjudication of those rights by the International Court of Justice, because Iran had not accepted the compulsory jurisdiction of the Court generally. Her 'Optional Clause' Declaration only related to disputes concerning the 'application of treaties or conventions accepted by Iran' and, moreover, (according to the finding of the Court) accepted 'subsequent to the ratification' of Iran's Optional Clause Déclaration, i.e. 19 September 1932. Therefore, in order to found compulsory jurisdiction, the United Kingdom had to show that the dispute involved (or involved *inter alia*) the application of a treaty, and a treaty subsequent to that date. The *modus operandi* was to invoke an Anglo-Iranian Treaty of 1857 (and also one of 1903) containing most-favoured-nation clauses,<sup>1</sup> and then, via these, to claim the benefit of a post-1932 Treaty, namely, the Irano-Danish Treaty of 1934, in which there was an article granting a right to treatment in accordance with 'the principles and practice of ordinary international law'.<sup>2</sup> However, the Court found in effect (see subsection (b) above) that although the second Treaty was post-1932, it could only be invoked through one of the earlier treaties, and that as these were pre-1932, they could not be invoked for the purpose of bringing Iran's Optional Clause Declaration into play. In exactly the same way in the *Ambatielos* case, Greece had a claim which was fundamentally a claim under general international law, and no treaty was required in order to enable the claim to be put forward on that basis—as indeed it originally was in the earlier diplomatic interchanges. But Greece was not a party to the Optional Clause (and in any case the United Kingdom's reservations to its own acceptance of that Clause would have applied to this dispute).<sup>3</sup> Greece could not therefore obtain a compulsory adjudication of the claim *simply as* an international law claim. Only if Greece could invoke the general rules of international law on a *treaty* basis—as being (through the operation of a most-favoured-nation clause) part of a treaty containing a provision for the submission to arbitration of disputes arising under it—would she be in a position to require an adjudication. The *modus operandi*

<sup>1</sup> These two provisions read as follows:

'The High Contracting Parties engage that . . . the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured-nation.

' . . . It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy in all respects, the régime of the most-favoured nation. . . .'

<sup>2</sup> This Article read as follows:

'The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests.'

<sup>3</sup> The United Kingdom was a party to the Optional Clause, but only in relation to disputes arising after 1930 and relating to facts or situations subsequent to that date—whereas the facts of the *Ambatielos* case dated from 1922.

was to cite a treaty containing such a provision, and then to argue that there was a breach of the treaty because (a) it contained a most-favoured-nation clause;<sup>1</sup> (b) this clause attracted general international rights said to have been granted by the United Kingdom to third countries under other treaties;<sup>2</sup> (c) the United Kingdom had allegedly failed to treat a Greek national in accordance with the international law rights in question; and (d) therefore the United Kingdom had failed to grant such international law treatment to Greece, and hence was in breach of the treaty.

(v) In neither of these cases did the attempt succeed; but it has been argued that it achieved a certain measure of success, indirectly, at any rate in the *Anglo-Iranian* case, because it was said that the Court, in a certain sense, accepted the legitimacy of the *process* of claiming a right to treatment in accordance with general international law through the medium of a most-favoured-nation clause.<sup>3</sup> But in fact, it does not seem that the Court did do so, except in so far as was necessary in order to determine the purely jurisdictional issue on the basis of the argument advanced by the United Kingdom (see subsection (a) above). Thus, had the most-favoured-nation clause concerned figured in a post-1932 treaty, it would seem that the Court would have decided that the issue duly involved the application of a treaty, or complex of treaties, accepted by Iran after September 1932, and any dispute concerning which would therefore be covered by Iran's Optional Clause Declaration. On that basis, the Court would then have held itself (*prima facie* at any rate) to have *jurisdiction* to go into the merits of the United Kingdom contention as to the effect of these treaties—but part of those same merits (or a further element in the jurisdictional issue) would precisely have been whether the true legal effect of the most-favoured-nation clauses in the Anglo-Iranian treaties, in conjunction with the relevant provision of the Irano-Danish Treaty of 1934, was to entitle the United Kingdom to claim, *as a treaty right*, treatment in accordance with the general rules of international law. Since the Court found that the essential United Kingdom right depended on a pre- and not a post-1932 treaty, it did not need to go into this further question. It does not follow that, had

<sup>1</sup> For the text see above, p. 86, n. 1.

<sup>2</sup> In particular, by Article 10 of an Anglo-Bolivian Treaty of 1911, which reads as follows:

'The High Contracting Parties agree that during the period of existence of this Treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.

'They reserve however the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law.'

<sup>3</sup> An argument to that general effect was put forward on behalf of Greece both in the second phase of the *Ambatielos* case before the International Court, and in the third phase before the Commission of Arbitration.



the Court done so, it would have found that the treaty provisions concerned had the effect suggested. There is nothing in the Judgment of the majority to indicate that this would have been their view, since the whole decision, so far as this point went, turned on the question of dates, and on whether the basic provision involved was the pre-1932 Anglo-Iranian Treaty of 1857 (or Treaty of 1903), or the post-1932 Irano-Danish Treaty of 1934.<sup>1</sup>

(vi) This view of the real bearing of the decision in the *Anglo-Iranian* case is confirmed by what happened before the Court in the *Ambatielos* case. Here again, although the point was argued at some length,<sup>2</sup> the Court did not go into it, and gave a decision that expressly left it open. What the Court found in effect in the *Ambatielos* case was that since the Greek Government had invoked the most-favoured-nation clause of the Anglo-Greek Commercial Treaty of 1886 for the purpose (*inter alia*) of seeking to attract into the Treaty general international law rights said to have been granted by the United Kingdom under other treaties; and since the United Kingdom Government contested this interpretation of the clause concerned, there was a dispute about the interpretation or execution of the Treaty which must be submitted to arbitration under the arbitration protocol attached to the Treaty. But the Court expressly declined (*I.C.J.*, 1953, p. 16) to pronounce

‘... upon any question of fact or law falling within “the merits of the difference” or “the validity of the claim . . .”. The task of the Court will have been completed when it has decided whether the difference between Greece and the United Kingdom . . . is or is not a difference as to the validity of a claim . . . based on the provisions of the Treaty of 1886 and whether, in consequence, there is an obligation binding the United Kingdom to accept arbitration.’

Thus the point was left entirely to the eventual Commission of Arbitration, before whom it was fully argued, and the Commission decisively rejected the view that the most-favoured-nation clause concerned could, on its wording (for the text see above, p. 86, n. 1), have the effect claimed. This in fact goes a long way towards a refutation of the whole idea, since the great majority of most-favoured-nation clauses are worded in this way, or alternatively in such a way that the basic effect is the same (see above, p. 88, n. 1). The Commission began by declining to pronounce on the purely abstract issue (Award, p. 42<sup>3</sup>):

‘The Commission does not deem it necessary to express a view on the general

<sup>1</sup> On the other hand, two of the Judges who delivered separate Opinions (Lord McNair and Judge Hackworth) gave it definitely as their view that, apart from the question of dates, and if the jurisdiction of the Court were already established, the United Kingdom would have been entitled to invoke the most-favoured-nation clause in this way. But the Court itself did not go nearly so far as that, and on the basis of the actual Judgment the point remains an open one. It was never argued in the *Anglo-Iranian* case.

<sup>2</sup> See the *I.C.J.* Volume of the Pleadings in the case, pp. 403-4 and 481-2.

<sup>3</sup> See above, p. 83, n. 2.



question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State", which would obviously not be the case<sup>1</sup> if the sole object of those provisions<sup>2</sup> were to guarantee to them<sup>3</sup> treatment in accordance with the general rules of international law.'

The intention of this passage is made clear in a further passage containing the Commission's operative finding (Award, p. 46):

'As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours or immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty.'

This therefore was a decisive rejection of the whole process, at any rate when based on this type of most-favoured-nation clause. The reference to Article 10 of the Anglo-Bolivian Treaty of 1911 (for the text see above, p. 92, n. 2) was to the provision under which the United Kingdom was supposed to have granted another country a right to treatment in accordance with the general rules of international law, and the Commission went on (*ibid.*):

'There is another decisive reason, however, which corroborates the preceding one: It is the fact that it is in no way the object of this provision [i.e. Article 10 of the Anglo-Bolivian Treaty] to guarantee to the nationals of the Contracting States the principles of international law.'

(vii) It is not necessary for present purposes to follow the Commission as to its reasons for rejecting the view that Article 10 of the Anglo-Bolivian Treaty conferred a right to treatment in accordance with the general rules of international law. They will be sufficiently obvious to anyone who studies the language of the provision in question (see above, p. 92, n. 2), and so, in effect, the Commission found. But it is desirable, by way of conclusion, to draw attention to certain essential differences between the texts and circumstances of the *Anglo-Iranian* case and those of the *Ambatielos* case, which have a considerable bearing on the whole subject—because it was part of the Greek contention in the *Ambatielos* case that the United Kingdom Government ought not to object to a process which they had themselves tried to employ in the *Anglo-Iranian* case; whereas the United Kingdom Government argued that if the *process* was analogous, the circumstances and relevant facts were very different. In fact, for reasons that will be indicated in a moment, the *Anglo-Iranian* case may well have

<sup>1</sup> I.e. it would not be a case of a 'privilege, favour or immunity', or of a 'grant'.

<sup>2</sup> I.e. the provisions in the treaty with the third ('other') State.

<sup>3</sup> I.e. the subjects or citizens of that other State.

been almost the only type of case in which this process had some justification. Apart from certain minor differences between the most-favoured-nation clauses involved in the two cases, which need not be gone into here, there was one major difference of wording that becomes material in the light of the Arbitral Commission's finding, above described. The phrase 'privilege, favour or immunity. . . granted . . . etc.' did not figure in the relevant texts in the *Anglo-Iranian* case, which, in more general terms, spoke of 'the footing of the treatment of the most-favoured-nation' and of enjoying 'the régime of the most-favoured-nation'.<sup>1</sup> More important, however, was the fact that in the *Ambatielos* case the provision appealed to as supposedly conferring a right to treatment in accordance with the general rules of international law clearly did not do so, whereas in the *Anglo-Iranian* case the corresponding provision did purport, on the face of it, and in the clearest and most direct terms, to grant such a right (for the text see above, p. 91, n. 2). But, more important still—and what constituted the real difference between the two cases—were the circumstances in which, in the *Anglo-Iranian* case, the right to treatment in accordance with the general rules of international law had been granted. About the year 1929, Iran unilaterally abolished the capitulatory régime, which had hitherto obtained for European nationals in Iran. In consequence, there was some room for doubt as to the basis on which such persons would thenceforward be treated there. Hitherto it had been on the basis of their own laws and consular jurisdiction, and to that extent the question of the application to them of the rules of general international law—in respect, for instance, of the treatment of foreigners in relation to the administration of justice, and in other ways—did not arise. But what was to be the position when the capitulations had been abolished? Did it automatically follow—especially in view of the unilateral character of the action in question—that the foreign nationals concerned would receive treatment in accordance with general international law? In this situation a number of European countries<sup>2</sup>—amongst them Denmark—considered that they had an interest in concluding treaties with Iran providing specifically for the reciprocal grant of international law treatment for their nationals.<sup>3</sup> The language of the provision concerned (see p. 91, n. 2)—taking the case of the Danish Treaty—was moreover unusual and striking, and confirmed the supposition that the object was to fill what might otherwise have been a gap or lacuna, caused by the sudden cessation of the capitulatory régime. On no other basis, for instance, can the use of such a phrase as 'in accordance with the

<sup>1</sup> See the full texts above, p. 86, n. 1, and p. 91.

<sup>2</sup> There were some ten in all, and the United Kingdom might have cited any of the treaties concerned.

<sup>3</sup> The reciprocal character of the clause, largely a matter of courtesy and form, should not be allowed to obscure its true character and object.

principles and practice of *ordinary* international law' be explained. In these exceptional—and indeed almost unique—circumstances, it could reasonably be argued

*firstly*, that there was an actual *grant* of international law rights under conditions when there was at least room for doubt as to whether these existed—or at any rate there was an assurance of international law treatment under conditions in which it might be uncertain whether such treatment would otherwise be received;

*secondly*, that in so far as these treaties were entered into by Iran only with certain countries, and not others, they involved in some sense a privilege or favour granted to those countries—that is, those countries received assurances that other countries did not.

On that basis, there were some grounds for maintaining that the conditions necessary to the operation of a most-favoured-nation clause were present—namely, that something was granted that the grantee country would not otherwise have (or be sure of having), and that such grant was in the nature, if not of a favour, at any rate in some sense of a privilege, and therefore extensible to the beneficiary of a most-favoured-nation clause. None of these considerations applied in the *Ambatielos* case.

(viii) *Conclusion*. In the light of the *Anglo-Iranian* and *Ambatielos* cases before the International Court, coupled with the further *Ambatielos* proceedings before the Anglo-Greek Commission of Arbitration, it seems a fair deduction that the process of invoking a right to general international law treatment through a most-favoured-nation clause is fundamentally suspect, and that there is a strong presumption against its legitimacy. Exceptionally, as in the *Anglo-Iranian* case, it may be justified—but only on the basis of special circumstances, and of texts framed in the clearest, most unequivocal, and most direct terms.



# THE EFFECT OF RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

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THE object of this article is to inquire into the political, legal, and moral effect of Resolutions adopted by the General Assembly of the United Nations. So long as the United Nations exists, it must be regarded as a matter of some importance to try to assess the effects of the Resolutions carried by its principal organ. The immediate context and starting-point of this inquiry is, however, the Advisory Opinion of the International Court of Justice of 7 June 1955 on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*.<sup>1</sup> It will be submitted that the reference of this matter to the Court led to certain views being expressed which make it particularly opportune to consider now a problem which is in any case of continuing and substantial significance in the history of the United Nations.

## 1. *The Advisory Opinion of the International Court of Justice in the 'Voting Procedure' case*

### *The Opinion of the Court*

It is not necessary to consider here in any detail the background of the *Voting Procedure* case. In an earlier Opinion, dated 11 July 1950, the Court had advised that 'the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted, and the reference to the Permanent Court of International Justice to be replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court'.<sup>2</sup>

The above statement was contained in the final, or operative, part of the Advisory Opinion of 11 July 1950. It was preceded by a statement in which, as part of its reasoning, the Court had said: 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates system, and should conform as far as possible to the procedure followed in this respect by the Council of the

<sup>1</sup> *I.C.J. Reports*, 1955, p. 67.

<sup>2</sup> *Ibid.*, 1950, p. 128, at p. 143.

League of Nations. These observations are particularly applicable to annual reports and petitions.<sup>1</sup>

Difficulties arose concerning the interpretation of the latter passage. Under Article 22 of the Covenant of the League of Nations, supervision over the Mandates system was exercised by the Council. Further, Article 5 of the Covenant stated: 'Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.' The Covenant did not, however, specify the supervision of Mandates as an exception to the rule of unanimity.

In 1954 the General Assembly resolved not merely that the supervision by the United Nations over the mandated territory of South-West Africa should be exercised by the General Assembly, but also that the decisions of the General Assembly on questions relating to reports and petitions concerning South-West Africa should be taken by a two-thirds majority.<sup>2</sup> This decision as to voting came to be referred to as Rule F. The question therefore arose whether Rule F was a correct interpretation of the passage in the Advisory Opinion of 11 July 1950 referred to above, or whether it involved a greater degree of supervision over South Africa than that exercised by the League of Nations, principally because it substituted a system of voting by a two-thirds majority for a system where a unanimous vote was required. It was this narrow—though important—question which was referred to the Court by the General Assembly on 23 November 1954.<sup>3</sup> The General Assembly also asked the Court, in the event of Rule F being found to be an incorrect interpretation of the relevant passage in the Court's earlier Opinion, 'what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?'

We may note in passing a most welcome, if rather unusual, following of strict legal procedure by the General Assembly. Although the Court's reply to a request for an Advisory Opinion is 'only of an advisory character' and as such 'has no binding force';<sup>4</sup> although even in a Judgment of the Court it is strictly only the operative part which binds the parties, and them

<sup>1</sup> *I.C.J. Reports*, 1950, p. 138.

<sup>2</sup> General Assembly Resolution 844 (IX) of 11 October 1954. It might have been more logical, and closer to the practice of the League of Nations, to make the supervising authority not the General Assembly but the Security Council. It seems to have been thought, however, that the General Assembly was the appropriate body since it has wide general powers under the Charter (especially Article 10), has already begun to exercise these powers in regard to 'non-self-governing territories' (Article 73), and has also certain powers in regard to the supervision of 'trust territories' (Articles 18, 85, 87, 88).

<sup>3</sup> General Assembly Resolution 904 (IX).

<sup>4</sup> *I.C.J. Reports*, 1950, p. 71.

only;<sup>1</sup> and although there is no provision in the Statute of the Court for the construction of an Advisory Opinion as there is for the construction of a Judgment, the meaning or scope of which is disputed (Article 60);<sup>2</sup> despite all these things, the General Assembly asked the Court in effect to construe its earlier Opinion, thereby tending to raise the legal status of that Opinion, and of Advisory Opinions in general.

The Court held unanimously that Rule F was a correct interpretation of the Advisory Opinion of 11 July 1950. The question was treated by the majority of the Judges on the narrowest possible basis, it being stated in the Opinion of the Court that the words 'the degree of supervision' related 'not to the manner in which the collective will of the General Assembly is expressed' but 'to the measure and means of supervision'.<sup>3</sup> To put it another way, the words in question did not relate to voting at all, but to 'the means employed by the supervising authority in obtaining adequate information regarding the administration of the Territory and the methods adopted for evaluating such information, maintaining working relations with the Mandatory, and otherwise exercising normal and customary supervisory functions'.<sup>4</sup>

Since Rule F was not relevant to 'the degree of supervision' at all, it followed—in the Court's view—that Rule F could not be considered as instituting a greater degree of supervision than that which was envisaged by the previous Opinion of the Court. The Court did, however, add an observation to the effect that, in its earlier Opinion, it had 'recognized implicitly' that decisions relating to the exercise by the General Assembly of its supervisory functions 'must be taken in accordance with the relevant provisions of the Charter, that is, the provisions of Article 18'.<sup>5</sup> The Court seems to have regarded it as unthinkable that the General Assembly should ever vote according to a procedure different from that prescribed in Article 18 of the Charter.<sup>6</sup>

### *The Separate Opinions of Judges Klaestad and Lauterpacht in the 'Voting Procedure' case*

Judges Klaestad and Lauterpacht felt it necessary to approach the

<sup>1</sup> See Article 59 of the Statute and also the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 29).

<sup>2</sup> Save perhaps for Article 68, which states that 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable'.

<sup>3</sup> *I.C.J. Reports*, 1955, p. 72.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 74. Article 18 provides that decisions of the General Assembly on 'important questions'—of which a list is given—shall be made by a two-thirds majority of the Members present and voting, and that 'decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting'.

<sup>6</sup> *Ibid.*, pp. 75–76. See, however, Judge Lauterpacht, *ibid.*, pp. 106–14.



question from a somewhat wider point of view. Although it would be wrong to generalize from any of the observations made by these Judges, or otherwise to take them out of their context, nevertheless the wider point of view from which they approached the question is closely related to the problem which is the subject of this article.

Judge Klaestad, for instance, thought that the task of the Court was 'to determine whether decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa would, by the operation of the voting procedure indicated in the Request [i.e. Rule F], subject the Union of South Africa to other or more onerous legal obligations than the Union had previously under the supervision of the League of Nations'.<sup>1</sup> On this point he concluded that the answer was in the negative because, whereas resolutions of the Council of the League of Nations concerning reports and petitions relating to the Territory of South-West Africa were legally binding upon the Union of South Africa,<sup>2</sup> this was not true of a Resolution of the General Assembly dealing with the same matter. The effects of such a Resolution, he said,

'are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation. But a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation, and it does not in any case involve a binding legal obligation to comply with the recommendation.'<sup>3</sup>

In this passage a distinction is drawn between the 'legal', 'moral', and 'political' nature of the effects of a Resolution of the General Assembly. A distinction is also drawn between, on the one hand, a situation in which a State is 'in duty bound to consider in good faith a recommendation adopted by the General Assembly . . . and to inform the General Assembly with regard to the attitude which it [i.e. the State] has decided to take in respect of the matter referred to in the recommendation' and, on the other hand, a situation in which a State incurs a 'true legal obligation', amounting in some cases to a 'binding legal obligation to comply with the recommendation'.

<sup>1</sup> *I.C.J. Reports*, 1955, p. 85.

<sup>2</sup> Judge Klaestad based this statement on the Advisory Opinion given by the Permanent Court of International Justice in the case concerning *Railway Traffic between Lithuania and Poland*, where the Court held that the Governments of the two countries were bound by their acceptance of a Resolution of the Council of the League of Nations respecting their mutual relations (*P.C.I.J.*, Series A/B, No. 42, pp. 115-16).

<sup>3</sup> *I.C.J. Reports*, 1955, p. 88.

The meaning of the passage does not, however, seem to be absolutely clear. It may mean that the duty to consider the General Assembly's recommendation in good faith and to inform the General Assembly of the attitude taken in respect of the matter referred to in the recommendation is to be regarded as a legal duty of a kind, though not 'a true legal obligation'. Perhaps it might be called a quasi-legal duty, requiring some action, though not necessarily compliance. In that event the position would appear to be that a resolution of the General Assembly could have (a) a moral effect, (b) a political effect, (c) a quasi-legal effect, in the sense of a duty to consider in good faith and to inform the Assembly, and (d) a true or full legal effect, in the sense of a 'binding legal obligation to comply'. The difference between these various types of effect would tend to be one of degree rather than of kind. Alternatively, the passage may mean that the difference between moral and political duties on the one hand, and legal duties on the other hand, is one of kind rather than of degree; that the indispensable hall-mark of a legal duty, which distinguishes it from other kinds of duty, is the requirement of compliance; and that where there is no requirement of compliance it is wrong to speak of a legal duty or even of a quasi-legal duty.

Judge Lauterpacht thought it was 'substantially correct' to say that 'while the supervision by the General Assembly exceeds that of the Council of the League of Nations inasmuch as it is exercised by a majority vote of two-thirds and thus deprived of the safeguards of unanimity, it is at the same time less exacting inasmuch as it is exercised by means of decisions of a character less binding than those of the Council of the League of Nations'. The result, he thought, was 'a rough equivalence of supervision which brings Rule F within the terms of the ruling of the Court in its Advisory Opinion rendered in 1950'.<sup>1</sup>

Judge Lauterpacht was careful to stress that 'in some matters—such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses—the full legal effects of the Resolutions of the General Assembly are undeniable'.<sup>2</sup> To this list of matters may be added, as has been indicated in a most valuable article,<sup>3</sup> the establishment of subsidiary organs (Article 22 of the Charter); the election of non-permanent members of the Security

<sup>1</sup> *I.C.J. Reports*, 1955, p. 115.

<sup>2</sup> *Ibid.*

<sup>3</sup> Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', in this *Year Book*, 25 (1948), p. 1. As this author rightly says, 'the major focus of interest' is not upon these categories of Resolutions, which are essentially internal to the United Nations, but upon the Resolutions containing recommendations addressed to States under Chapter IV, Articles 10–14, of the Charter (*ibid.*, p. 5).



Council (Article 23); responsibility for the discharge of the economic and social functions of the United Nations (Articles 60 and 66); approval of agreements between the Economic and Social Council and the specialized agencies (Article 63); approval of trusteeship agreements (Article 85); general responsibilities in connexion with the international trusteeship system (Article 87); the right to request the International Court of Justice to give an Advisory Opinion on any legal question (Article 96 (1)); the right to authorize other organs of the United Nations and the specialized agencies also to request Advisory Opinions of the Court on legal questions arising within the scope of their activities (Article 96 (2));<sup>1</sup> the right to entrust functions to the Secretary-General (Article 98); and the establishment of staff regulations (Article 101): as well as a share in the determination of the conditions on which a State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice (Article 93); in the amendment of the Charter (Articles 108 and 109); and in the election of Judges of the International Court of Justice (Article 8 of the Statute). Finally, the General Assembly can apparently create an inferior tribunal which has power to bind the Assembly itself, even to the extent of restricting the freedom of the Assembly and its Members in regard to the budget of the Organization.<sup>2</sup>

But, in general, as Judge Lauterpacht pointed out, Resolutions of the General Assembly are 'in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them'.<sup>3</sup> Later, the same authority referred to 'recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation'.<sup>4</sup>

As we have seen, both Judge Klaestad and Judge Lauterpacht took the view that, on balance and in substance, 'the degree of supervision' imposed on the Union of South Africa under Rule F was no more onerous than that imposed under the Mandates system of the League of Nations. But in some instances distinctions, which appeared to Judge Klaestad as precise and clear-cut, seem to have been regarded by Judge Lauterpacht as relatively imprecise. The former Judge contrasted the principle of unanimity which obtained in the Council of the League<sup>5</sup> with the principle of the two-thirds

<sup>1</sup> Excluding, of course, the Security Council, which is given the right to ask for an Advisory Opinion under Article 96 (1) itself.

<sup>2</sup> Advisory Opinion on *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (I.C.J. Reports, 1954, p. 47). <sup>3</sup> Ibid., 1955, p. 115. <sup>4</sup> Ibid., p. 116.

<sup>5</sup> As he said, '... the Council of the League of Nations was governed by the rule of unanimity when voting on matters relating to Mandates' (ibid., p. 87). Judge Klaestad also drew attention



majority which obtains in the General Assembly of the United Nations. He also had no doubt that, whereas Resolutions of the Council of the League were legally binding, Resolutions of the General Assembly were not; and that, even if such Resolutions had some moral or political force, those were different considerations altogether and not relevant to the legal interpretation of the words 'the degree of supervision'. But Judge Lauterpacht did not agree, on the one hand, that the principle of unanimity obtained in the Council of the League when the Council was exercising its supervisory functions over Mandates. He thought that in that situation the principle of unanimity was qualified by the principle *nemo iudex in re sua*, with the result that the Mandatory was not entitled to vote when its administration of the Mandate was being considered by the Council. Neither, on the other hand, was he prepared to concede that Resolutions of the General Assembly were less binding than Resolutions of the Council of the League to such an extent as to amount to an altogether different kind of supervision.

It is this latter point which is of interest here. Judge Lauterpacht considered in some detail the question of the legal effect of Resolutions of the General Assembly relating to the international trusteeship system. He declared that 'there is no legal obligation, on the part of the Administering Authority, to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure'.<sup>1</sup> He based this conclusion not merely on a legal interpretation of the Charter but also on considerations of a more practical nature. After indicating that it is the Administering Authority, rather than the General Assembly, that bears the direct responsibility for the welfare of the population of a Trust Territory, he observed that 'there is no sufficient guarantee of the timeliness and practicability of a particular recommendation made by a body acting occasionally amidst a pressure of business, at times deprived of expert advice and information, and not always able to foresee the consequences of a particular measure in relation to the totality of legislation and administration of the trust territory'.<sup>2</sup>

This mild censure of certain practices of the General Assembly did not, however, lead Judge Lauterpacht to the conclusion that the Resolutions of that body are without a certain effect. 'It is one thing', he said, 'to affirm the somewhat obvious principle that the recommendations of the General Assembly in the matter of trusteeship or otherwise addressed to the

to the fact that Article 4 of the Covenant prescribed that a Member of the League, not represented in the Council, should be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member. Moreover, such a Member was entitled to vote. 'By virtue of these rules', concluded Judge Klaestad, 'the Union of South Africa was entitled to be represented with voting power, when the Council considered matters relating to the Mandated Territory of South-West Africa, and it could, in its capacity as a Member of the League, prevent the adoption of a decision by voting against it' (ibid., p. 85).

<sup>1</sup> Ibid., p. 116.

<sup>2</sup> Ibid.

Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that therefore they cannot be regarded as forming in any sense part of a legal system of supervision.<sup>1</sup>

Judge Lauterpacht's words are obviously chosen with such care that it would be improper to paraphrase them. The key passages in his Individual Opinion must be left to speak for themselves.

In the first of these passages he said:

'A Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation. . . .'<sup>2</sup>

In another passage he said:

'Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administered by virtue of the principles of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organisation, in particular in proportion as that judgment approximates to unanimity, may find that it has over-

<sup>1</sup> *I.C.J. Reports*, 1955, p. 118.

<sup>2</sup> *Ibid.*, pp. 118-19.



stepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.’<sup>1</sup>

In a final passage, and on a rather different point, Judge Lauterpacht said:

‘Moreover . . . even if the view is adopted that the effect of a decision of the General Assembly is no greater than its moral force, a decision thus conceived still constitutes a measure of supervision. A system of supervision devoid of an element of legal obligation and legal sanction can nevertheless provide a powerful degree of supervision because of the moral force inherent in its findings and recommendations. . . . Moral reprobation following upon non-compliance with a valid recommendation adopted in conformity with the Charter may provide a means of supervision as potent or more potent than a legal sanction.’<sup>2</sup>

If there is some doubt whether Judge Klaestad is prepared to admit the existence of some kind of quasi-legal duty falling short of full compliance with the terms of a resolution of the General Assembly, yet different from a moral or political duty, there can be no doubt that, in Judge Lauterpacht’s view, there are two kinds of legal obligation. There are legal obligations which are ‘rudimentary, elastic, and imperfect . . . intangible and almost nominal’, such as the obligation to give due consideration in good faith to Resolutions of the General Assembly. Even these obligations, however, have a certain ‘cumulative effect’. There are also legal obligations that are ‘automatic’ and require that ‘full effect’ be given to the Resolutions of the General Assembly.

We shall not continue the analysis of the two Separate Opinions but shall rather conclude this section by affirming that, although Judges Klaestad and Lauterpacht agreed on the answer to the particular question put to them in the *Voting Procedure* case, their observations with regard to the problem of the political, legal, and moral effect of Resolutions of the General Assembly of the United Nations seem to be sufficiently different in approach and, above all, sufficiently tentative and undogmatic in character, to justify a fuller investigation of this problem. This investigation will take the form, first, of a consideration of certain other opinions expressed on the matter; and, second, of an attempt to probe rather more deeply into the meaning of such terms as ‘political effect’, ‘legal effect’, and ‘moral effect’ when used in connexion with Resolutions of the General Assembly.

## 2. *Certain other opinions on the legal and moral effect of Resolutions of the General Assembly*

A number of other opinions on this question will now be considered.

<sup>1</sup> *I.C.J. Reports*, 1955, p. 120.

<sup>2</sup> *Ibid.*, pp. 120-1.



It will be submitted, however, after a study of the relevant authorities, many of them leading commentators upon the Charter, that no clear and consistent solution of the problem emerges. Rather, what is significant is that, whereas many writers treat the matter of the political, legal, and moral effect of Resolutions of the General Assembly as if it gives rise to no special problems, others regard it as one not capable of a precise answer, if indeed it can be answered at all. Foremost among those who adopt the former view is Alvarez, who, as a former Judge of the International Court of Justice, expressed on many occasions the opinion that Resolutions of the General Assembly are virtually binding upon States in a legislative sense.<sup>1</sup> Equally straightforward, although in the opposite sense, is Brierly, who has said that

'apart from its control over the budget, all that the General Assembly can do is to discuss and recommend and initiate studies and consider reports from other bodies'.<sup>2</sup>

More or less the same opinion is expressed by Wilcox and Marcy, who say that 'The General Assembly, of course, does not possess international legislative authority. It can study, it can debate, it can recommend, but it cannot legislate. In general, apart from the approval of the budget, it cannot make decisions that are binding on the Members of the United Nations.'<sup>3</sup> It would not be difficult to show that certain of these views are too extreme and are presented with an exaggerated simplicity.<sup>4</sup>

Scarcely less emphatic than the writers just quoted are Goodrich and Hambro, who say: 'Although the General Assembly may make recommendations both to the Members of the United Nations and the Security Council, it should be kept in mind that recommendations have no obligatory character, as has been shown in the Palestine case, although they may be of the greatest political importance. The Members of the United Nations are legally free to accept or reject them.'<sup>5</sup> Similarly, Eagleton, after explaining that 'no decisions taken by it [i.e. the General Assembly] are binding upon a Member without ratification by that Member', says: 'The work of the Assembly issues in the form of Resolutions which, while not legally enforceable, are of great weight, and desperate parliamentary battles may

<sup>1</sup> See, for example, his Individual Opinion in the *Anglo-Norwegian Fisheries* case (*I.C.J. Reports*, 1951, p. 152) and also his Dissenting Opinion in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*ibid.*, p. 49). In the latter Opinion, in particular, Judge Alvarez seems to have made his position clear. He said that Resolutions of the General Assembly 'have not yet acquired a binding character, but they may acquire it if they receive the support of public opinion'. Public opinion, he said, had in several cases condemned an act contrary to a Resolution of the General Assembly 'with more force than if it had been a mere breach of a convention of minor importance'. He therefore felt able to conclude that 'the Assembly of the United Nations is tending to become an actual legislative power' (at p. 52).

<sup>2</sup> *The Law of Nations* (5th ed., 1955), p. 107.

<sup>3</sup> *Proposals for Changes in the United Nations* (1955), p. 348.

<sup>4</sup> See pp. 101-2, above, and especially the article by Sloan, *loc. cit.*

<sup>5</sup> *Charter of the United Nations* (2nd ed., 1949), pp. 151-2.

be fought to avoid unfavourable conclusions.’<sup>1</sup> The same author adds that ‘The action which it [i.e. the General Assembly] may take goes no further than recommendation, and it cannot pass legislation binding upon Members’.<sup>2</sup> Elsewhere, he is even more firm in his opinion, saying: ‘It is clear to any student of the Charter that a resolution of the General Assembly, such as that for the partition of Palestine, is no more than a recommendation, and that it can have no legally binding effect upon any State whatsoever.’<sup>3</sup>

Kelsen, however, in his monumental work, does not appear to be convinced that a recommendation of the General Assembly addressed to a State can never be binding. Although he observes that ‘Recommendations, by their very nature, do not constitute a legal obligation to behave in conformity with them’,<sup>4</sup> he also points out that in the Charter the term ‘recommendation’ has, or may have, several different meanings.<sup>5</sup> He even envisages circumstances in which recommendations of the General Assembly may be binding upon States. ‘The legal effect’, he says, ‘of the recommendations made by the General Assembly is the same as that of the recommendations made by the Security Council. They are not binding unless the Security Council considers non-compliance with a recommendation made by the Assembly as a threat to the peace under Article 39. There is a difference only in so far as the General Assembly has not the power which the Security Council does have: to enforce its own recommendations.’<sup>6</sup> It seems, therefore, that a recommendation of the General Assembly in the field of the maintenance of international peace and security may possibly be binding. But Kelsen also concludes that ‘In the field of economic and social co-operation the Organisation, acting through the General Assembly and the Economic and Social Council, has only the power to make recommendations which are legally not binding upon the Members’.<sup>7</sup> Therefore, he says, ‘It stands to reason that the resolution of the General Assembly on Human Rights has no legal effect whatever’.<sup>8</sup> De Visscher also describes the Universal Declaration of Human Rights as a ‘document de portée simplement morale’.<sup>9</sup>

So far no conclusion seems to emerge, except that there is a fair amount of support among writers for Judge Klaestad’s view that, although, on the one hand, a recommendation of the General Assembly may be without true legal effects, it may, on the other hand, have effects of a moral or political character. Many authors also seem to think that the fact that the work of the General Assembly issues in the form of ‘recommendations’ is

<sup>1</sup> *International Government* (1948), p. 322.

<sup>2</sup> *Ibid.*, pp. 322-3.

<sup>3</sup> *American Journal of International Law*, 42 (1948), p. 397.

<sup>4</sup> *The Law of the United Nations* (1951), pp. 195-6.

<sup>5</sup> *Ibid.*, p. 63.

<sup>6</sup> *Ibid.*, p. 459.

<sup>7</sup> *Ibid.*, p. 99.

<sup>8</sup> *Ibid.*, p. 40.

<sup>9</sup> *Théories et réalités en droit international public* (1953), p. 158.



almost in itself sufficient to indicate that the General Assembly cannot bind individual States.

This latter conclusion is supported to some extent by the Joint Opinion of seven of the Judges of the International Court of Justice in the *Corfu Channel* case, when they held that 'having regard . . . to the normal meaning of the word recommendation' a recommendation of the Security Council, to the effect that the United Kingdom and Albania refer their dispute to the Court, was not sufficient to establish the compulsory jurisdiction of the Court in the absence of the consent of both parties.<sup>1</sup> This reasoning, however, seems singularly unconvincing. As Sloan has shown, the fact that the form of a 'recommendation' is used is not decisive one way or the other.<sup>2</sup> The General Assembly often issues 'recommendations' to inferior organs when clearly, in practice, it is giving them orders.<sup>3</sup>

Sloan considers that the non-obligatory status of General Assembly Resolutions is 'far from being as definitely established as has been assumed by most writers'. In his opinion, 'The most that can be said is that there is a presumption against these recommendations possessing binding legal force. But it is not an irrebuttable presumption.'<sup>4</sup> For example, according to this writer, there is no reason why States who vote in favour of a recommendation should not bind themselves by so doing 'where the intention is to be so bound'.<sup>5</sup>

<sup>1</sup> *I.C.J. Reports*, 1948, p. 15, at p. 32. See also the Dissenting Opinion of Dr. Daxner (*ibid.*, pp. 33-35).

<sup>2</sup> A question, formerly much discussed, was whether those Members of the League of Nations (including the United Kingdom) who voted in favour of the Resolution of the Assembly of the League of Nations of 11 March 1932, embodying the doctrine of non-recognition, were bound by that Resolution. The Resolution declared that 'it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris'. It was strongly urged by Professor H. A. Smith that this Resolution was not binding upon the United Kingdom. He made the point, *inter alia*, that the credentials of delegates to the League Assembly did not clearly give them power to assume onerous obligations of this type (see this *Year Book*, 16 (1935), p. 157). With regard to the same Resolution Brierly observed: '... the governing consideration seems to be that the Covenant confers no general authority on the League or on any of its organs to take action which will have the effect of creating obligations legally binding on its members; there are only certain exceptional cases in which League action has this legal effect, and they are express. . . . The juridical analysis of an ordinary resolution of the Assembly is surely a simple matter. It is not a legislative act; it does not constitute a treaty between the members; it is a *Vereinbarung*, a concordant declaration of wills, and not a *Vertrag*. From the point of view of the individual member joining in it, its significance is that the member, through its delegates, has made a formal declaration of intention or policy. Such a declaration is not immutable, but it is certainly not lightly to be departed from, and ordinary decency requires that it should not be departed from without notice to, and consultation with, the other concurring members' (*ibid.*, p. 160). It seems safe to conclude that Brierly was holding that, if a Member voted for a Resolution in the Assembly and the Resolution was adopted, that Member incurred certain moral, and possibly even legal, obligations.

<sup>3</sup> There is no doubt that a 'Recommendation' adopted by the General Conference of the International Labour Organization has a limited legal effect, so far as concerns all Members of the Organization (see Article 19 of the Constitution of the I.L.O.).

<sup>4</sup> *Loc. cit.*, p. 16.

<sup>5</sup> *Ibid.*, p. 22.



Sloan even goes so far as to hold that there is 'an inherent power in the General Assembly as the most nearly representative organ of the international community to impose its will in limited fields'; that 'the limitation of power of the General Assembly is not derived so much from the meaning of the word "recommend", which [as he rightly says] is not always used in a non-obligatory sense, but is rather to be found in established axioms of international law retained in the Charter under the principles of "sovereign equality" and "domestic jurisdiction"'; that these principles, however, are not absolute; and, consequently, that 'In those areas and on those matters where sovereignty is not vested in a Member State, the General Assembly acting as the agent of the international community may assert the right to enter the legal vacuum and take a binding decision.'<sup>1</sup>

This seems to be going too far and to amount, in some cases, to asserting what it is necessary to prove. The basis of the 'inherent power' of the General Assembly and its right to act as 'the agent of the international community' is assumed, not proved. Moreover, while it may be conceded that 'domestic jurisdiction' is not an absolute principle,<sup>2</sup> it is less easy to agree, in the present state of the authorities, that sovereignty is not an absolute principle in the sense that there are certain areas and matters—a legal vacuum as it were—where the principle of sovereignty does not apply at all and where it falls to 'the agent of the international community' to take binding decisions.<sup>3</sup>

Turning next to the question of the moral effect of Resolutions of the General Assembly, Sloan has made an impressive collection of the phrases used to describe this effect. They include 'moral force', 'moral authority', 'moral weight', 'moral power', 'moral obligation', 'morally binding', and even (by Mr. Dulles) 'moral judgment'.<sup>4</sup> Obviously referring to the test often used to distinguish 'law' from 'morality',<sup>5</sup> Sloan adds, significantly, the following comment: 'The force of a recommendation', he says, 'is not derived from a judgment made in an internal court of conscience, but from a judgment made by an organ of the world community and supported by many of the same considerations which support positive international law. The judgment by the General Assembly as a collective

<sup>1</sup> Loc. cit., pp. 23-24.

<sup>2</sup> As the Permanent Court of International Justice said in the case concerning *Nationality Decrees issued in Tunis and Morocco*: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations' (*P.C.I.J.*, Series B, No. 4, p. 24).

<sup>3</sup> E.g. in the *Lotus* case, the Permanent Court of International Justice said that 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will. . . . Restrictions upon the independence of States cannot therefore be presumed' (*P.C.I.J.*, Series A, No. 9, p. 18). On this question see Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 8-18.

<sup>4</sup> Loc. cit., p. 31.

<sup>5</sup> E.g., 'A rule is a rule of morality, if by common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it will eventually be enforced by external power'. This definition is taken from Oppenheim, *International Law*, vol. I (8th ed., by Lauterpacht, 1955), p. 8.

world conscience is itself a force external to the individual conscience of any given State.'<sup>1</sup> Finally, Sloan concludes with a passage which, even though we must subject it to criticism, testifies amply to the nobility of his aim. 'The "moral force" of the General Assembly', he says, is a 'nascent legal force which may enjoy, in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality or justice until the time when the *imprimatur* of the world community will attest its jural quality.'<sup>2</sup>

But Justice Cardozo's actual words, which are taken from *New Jersey v. Delaware*,<sup>3</sup> were: 'International Law, or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court<sup>4</sup> attests its jural quality.' We must leave until later the question whether it is reasonable to transpose these words so that the General Assembly becomes endowed with the qualities of a court.

Cheever and Haviland express a view which appeals no doubt to common sense, when, referring to Resolutions of the General Assembly, they say: 'It is not so much their legal character as "recommendations" which determines their effectiveness but rather the quality, quantity and intensity of community support behind them.'<sup>5</sup> A similar idea, although expressed in a more sophisticated manner, is voiced by Ross who, after observing that, legally, the line between an 'order' and a 'recommendation' may be absolute and sharp, proceeds to say that

'the practical difference in international relations will often be relative and fluid. On the one hand, the binding force of the legal obligations in this field is unfortunately in many cases not strictly maintained, while on the other hand a "recommendation" issuing from an organ such as the General Assembly of UN will frequently—especially if the great powers have agreed upon it—have a moral and political motivating force which makes it more effective than many a legal norm. Hence there is no reason to attach too much weight to the fact that the Assembly can never go beyond the mild mode of recommendation. If the United Nations are successful enough to develop harmoniously and establish their authority, this form will not prevent the General Assembly from acting according to the motto "*suaviter in modo, fortiter in re*".'<sup>6</sup>

If the above survey of the doctrine has been only partially successful in clarifying the position with regard to the political, legal, and moral effect of Resolutions of the General Assembly, it is believed that the true cause is the use by different writers of words such as 'legal', 'moral', and 'political' in different senses. It is therefore to the problem of the meaning of such

<sup>1</sup> At p. 32. Even if the rest of this argument be accepted, it still seems to us that it is straining terms to refer to a Resolution of the General Assembly as a 'judgment'.

<sup>2</sup> Loc. cit., pp. 32-33.

<sup>3</sup> (1934), 291 U.S. 361, at p. 383.

<sup>4</sup> Italics added.

<sup>5</sup> *Organizing for Peace* (1954), p. 89.

<sup>6</sup> *Constitution of the United Nations* (1950), pp. 60-61.



words, when used in connexion with Resolutions of the General Assembly, that we shall turn in the next section.

3. *The meaning of the terms 'political effect', 'legal effect', and 'moral effect' when applied to Resolutions of the General Assembly*

One difficulty which stands in the way of any attempt to assess the true effect of Resolutions adopted by the General Assembly is that the character of these Resolutions is so varied. They may be addressed to one State or to several States or to the world at large; they may be addressed to Members of the United Nations or to non-Members; the Members to whom they are addressed may have voted for them, against them, or may have abstained; they may relate to the maintenance of international peace and security or to the domestic affairs of a single State; they may be *intra vires* or *ultra vires*; finally, they may use a variety of words such as 'request', 'recommend', 'invite', or 'call upon'. All these factors may have some bearing upon their political, legal, or moral effect. But it would be quite impossible in an article of this kind to consider every conceivable set of circumstances. We shall therefore presume a Resolution addressed to a single Member of the United Nations which has voted against it, 'recommending' that Member to act, or to abstain from acting, in a certain way. In order to avoid the complication of Article 2 (7) of the Charter, the Resolution must be assumed to be *intra vires*, though it need not necessarily relate to the maintenance of international peace and security.

It is necessary in the first place to stress that the ordinary meaning of the word 'effect' is simply 'result' or 'consequence'. This caution is essential because there is sometimes a tendency to equate 'effect' with 'obligation'—as if, for instance, a Resolution of the General Assembly could not have an effect without at the same time giving rise to an obligation. But an obligation is a very different thing from an effect. It is defined by *The Concise Oxford Dictionary* as 'binding agreement, especially one enforceable under legal penalty, written contract or bond; constraining power of a law, precept, duty, contract, &c.; one's bounden duty, a duty, burdensome task . . .'. This definition suggests that, while legal obligations may be the most familiar form of obligations, there are also obligations which are not specifically legal, such as those arising from precept or any kind of duty.

The essence of an obligation, however, is that it is something which one is 'bound' to do. By comparison, an effect is simply something which happens. If, as a result of some action being taken, an obligation arises, then it is possible to say that the action has both had an effect and given rise to an obligation: indeed, the effect of the action in this case will have been to give rise to the obligation. But it is equally possible for the action to have had some other result: then the action will still have had an effect,



but it will not have given rise to an obligation. Similarly, an obligation may exist without any necessity for prior action to be taken. Such, for instance, are the obligations, inherent in the very nature of man, which lie at the root of what is often called—not too happily perhaps—the ‘moral law’.<sup>1</sup>

To define ‘obligation’ in terms of something which one is ‘bound’ to do is not, however, enough. It is still necessary to have a clearer notion of what is meant by such words as ‘bound’ and ‘binding’. In the whole of jurisprudence, perhaps, there are no words more difficult to define than these. Certainly it is true that, in the field of international law especially, there are no words less adequately defined than these two, having regard to the frequency with which they are used.

The word ‘binding’ has of course no meaning in the abstract. It has meaning only in relation to a branch of knowledge, or science, which is capable of distinguishing between situations where human beings are bound to act in a certain way and situations where they are not bound to act in that way. Such sciences it is convenient to call ‘regulatory sciences’, because they are concerned with regulating human conduct. In brief, these sciences are concerned with establishing ‘rules’, and a ‘rule’ is defined by *The Concise Oxford Dictionary* as a ‘principle to which action or procedure conforms or is *bound* or intended to conform . . .’.<sup>2</sup> To put it in the simplest possible terms, a ‘rule’, like an ‘obligation’, is concerned with what *ought* to be done, whereas an ‘effect’ is concerned with what happens in practice, or with what *is* done.

To carry the reasoning a stage further, a set of rules may be called an ‘order’. Thus a set of legal rules would be a ‘legal order’ and a set of moral rules would be a ‘moral order’. These rules would be binding in their respective orders simply because they were rules. Their character as rules, and thus their binding character, would stem, not from the fact that they

<sup>1</sup> In his admirable book, *English Law and the Moral Law* (1953), Professor A. L. Goodhart writes (at p. 35): ‘. . . if we accept as our basic premise that, as man is a social animal, it is natural and right for him to seek to benefit his fellow-men, it then becomes the basic premise of this moral law that a man shall love and not hate his neighbour.’ If this basic premise be accepted, ‘it is then possible’, continues the author, ‘to develop by reason certain moral rules. The rational man must realise that there are rules of conduct which are necessary for the good life both of the individual and of the community.’ The expression ‘moral law’ is not a very happy one because, although it may be wise to associate law with morality, it is dangerous to confuse the two. It must be admitted, however, that the General Assembly has itself used the expression. Thus, in Resolution 96 (I) of 11 December 1946 it affirmed that genocide is ‘contrary to moral law’. To revert to Professor Goodhart’s book, what is significant is that he submits (at p. 37) that ‘the type of moral law based on reason, divorced from other authority’ has exercised much influence in English law, and even that ‘morality has played a particularly important part in the development of the common law’. If this be true of the development of a municipal system of law equipped with a powerful legislature, *a fortiori* must it be true—or at least potentially true—of the international legal system, which is at present relatively lacking in law-making bodies.

<sup>2</sup> Italics added. The terms ‘regulatory’ and ‘rule’ seem preferable to the expressions ‘normative’ and ‘norm’, as being more in everyday use and therefore as bearing a less technical connotation.

were enforced, but simply from their status as principles established under the appropriate 'regulatory science'. Thus a legal rule, which would bind in the legal order, would be a principle established by legal science. Similarly, a moral rule would bind in the moral order and would be a principle established by moral science.

It is sometimes said that 'in order to establish a legal obligation, a sanction must be attached to the contrary behaviour'.<sup>1</sup> No doubt, sanctions often, indeed usually, are attached to behaviour contrary to legal obligations, but to say that they must be so attached comes very near to saying that legal rules are binding if, and only if—indeed because—they are enforced. It will be convenient to indicate here our profound disagreement with this view, and our agreement with Sir Gerald Fitzmaurice's neat phrase to the effect that 'the law is not binding because it is enforced: it is enforced because it is already binding'.<sup>2</sup>

Before, however, considering the nature of legal obligations, and in particular the question whether Resolutions of the General Assembly addressed to countries who do not wish to comply with them can give rise to legal obligations, it will be convenient to study a little further the nature of, respectively, legal science, moral science, and political science.

The two branches of knowledge which are most concerned with the regulation of human conduct are, as is well known, law and morals. As compared with these 'regulatory sciences', politics or political science is essentially a 'descriptive' or 'explicative' science. It describes and explains the manner in which men organize themselves for certain social purposes. It is especially concerned with the function of government and with the different ways in which this function is carried on. It is concerned also with the relations between all kinds of groups in one and the same national society. Finally, it is concerned no less with the relations between States and with the functions and powers of international institutions in the international society.

In so far as any Resolution adopted by the General Assembly of the United Nations, an international political organ, necessarily has some

<sup>1</sup> Kelsen, *op. cit.*, p. 96.

<sup>2</sup> 'The Foundations of the Authority of International Law and the Problem of Enforcement', 17 *Modern Law Review*, 19 (1956), p. 1. See also Sir Frederick Pollock, *A First Book of Jurisprudence* (3rd ed., 1911), p. 29. It may further be noted that in the second phase of the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (I.C.J. Reports, 1950, p. 221), the Court (at pp. 228-9) recalled its earlier Opinion (*ibid.*, p. 65) where it had found that the Governments of Bulgaria, Hungary, and Roumania were under an obligation (i.e. a legal obligation) to appoint their representatives to the Treaty Commissions, and proceeded to say: '... it is clear that refusal to fulfil a treaty obligation involves international responsibility.' Nevertheless, the Court found that it would not be proper for the Secretary-General to appoint the 'third member' of these Commissions unless both parties had already appointed their representatives. Finally, the Court concluded: '*The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another.*' (Italics added.)



consequences upon the relations between States or upon the functions and powers of international institutions, then it follows that such Resolutions have truly a political effect. A Resolution of the General Assembly may also have a certain political effect if its adoption has consequences upon the relations between the Government of a State and its own subjects. The effect of some Resolutions will naturally be greater than that of others, but all will have some political effect. This is only to state the obvious. It is, however, only preliminary to a consideration of the question, which is much more difficult and fundamental, whether a Resolution of the General Assembly can also give rise to a political obligation. For, as we have seen, while it is possible for something both to have an effect and also to give rise to an obligation, it is no less possible for something to have an effect without giving rise to an obligation. Conversely, obligations can exist without necessarily being the effect of prior human action.

According to the view we have put forward of the nature of politics (political science) on the one hand, and of law (legal science) and morals (moral science) on the other hand, there can be no such thing as a 'political obligation'. This is so because political science is not a 'regulatory science', and there are no political 'rules', in the sense in which we have defined these terms. Yet it is sometimes suggested that 'political obligations' exist. For instance, it has been said that Article 5 of the North Atlantic Treaty of 1949<sup>1</sup> 'does not impose a legal obligation on the parties'.<sup>2</sup> It has, however, been said of the same Article, and by the same author, 'But that it is a political obligation is plain, and the sanction against its breach is plain'.<sup>2</sup>

There is much to be said for the view that the obligation, such as it is, contained in Article 5 of the North Atlantic Treaty is not a legal obligation because the existence and extent of the 'obligation' are determinable not so much judicially as by the parties themselves. It is less easy, however, to agree that the Article imposes a 'political obligation', and that such an obligation exists because there is some kind of political sanction attached to it. The nature of any such political sanction is not clear. It could be of a very general character, in the sense that, if obligations of this kind were

<sup>1</sup> Treaty Series No. 56 (1949). This Article states that 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, *such action as it deems necessary*, including the use of armed force, to restore and maintain the security of the North Atlantic area. . . .' The presence of the words in italics has been held to justify the view that the text gives rise to no legal obligation because 'an obligation cannot be properly called a legal obligation unless its existence and extent are determinable judicially, that is, according to general principles of law; and if the agreement has provided in advance that the parties are to be the judges, each for itself, then *cadit quaestio*': see Fawcett, 'The Legal Character of International Agreements', in this *Year Book*, 30 (1953), p. 381, at p. 392.

<sup>2</sup> Ibid., p. 398.



not kept, the result would be international anarchy to the disadvantage of all. *Universum genus humanum natura est unitum ad certum finem*. But the sanction could also be more direct and compelling in the sense that, if this particular obligation (Article 5) were not kept, the security of all the parties to the North Atlantic Treaty would be immediately endangered.

On the assumption that these considerations are valid, it would be possible to argue that Resolutions of the General Assembly give rise to political obligations. If such Resolutions are not complied with, international relations generally may tend to become more troubled. In particular, the minority who refuse to comply will lose the political friendship and understanding of the majority who pass the Resolutions. But, according to the view which we have put forward, these considerations are not valid. For their validity depends upon the hypothesis, which we have rejected, that the binding character of obligations arises from some kind of compulsion. Whereas we have rather suggested that the binding character of rules and obligations stems not from the fact that they are enforced but from their status as principles established within the confines of an appropriate regulatory science. The conclusion on this point is, therefore, quite simple: while Resolutions of the General Assembly may have a 'political effect', they do not give rise to political obligations.

With a view to considering next the legal effect of Resolutions of the General Assembly, we revert once again to the problem of the source of legal obligations in international law. Without embarking upon fundamental questions of doctrine, we agree generally with those writers who contend that it lies in the 'juridical conscience' (*conscience juridique*) of humanity.<sup>1</sup> It has been said of this expression by a learned author that it 'conveys the meaning of the consciousness . . . of a standard of judgment of human behaviour which has come to be specified as juridical, as distinct from the moral, religious or similar disciplines of human thought or conduct'.<sup>2</sup> When it becomes a question of distinguishing between principles of law and principles of other cognate social disciplines, such as religion and morality, the same author considers that the answer lies in the recognition or non-recognition by civilized peoples of the legal character of the principles concerned.<sup>3</sup> By the recognition of legal character is meant, in our view, the sentiment that the principles ought to be enforced by the

<sup>1</sup> Especially with Krabbe, who says: 'pour le droit international . . . la base de son caractère obligatoire réside dans la conscience juridique de l'homme' (*Recueil des Cours de l'Académie de Droit International*—referred to subsequently as *Recueil des Cours*—13 (1926) (iii), p. 577); and also with Accioly, who says: 'Le droit international est valable, parce que les hommes ont conscience, sont convaincus de sa validité, c'est-à-dire du caractère obligatoire de ses règles' (*Traité de droit international public*, vol. i (1940), p. 14).

<sup>2</sup> Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 8, n. 32.

<sup>3</sup> *Ibid.*, p. 24.

external power of society, rather than by the internal force of the conscience, even if they are not so enforced at present.

But, as Judge Alvarez has remarked, 'For the principles of law resulting from the juridical conscience of peoples to have any value, they must have a tangible manifestation, that is to say, they must be expressed by authorized bodies'.<sup>1</sup> With this statement as such few would disagree. The question remains, however, who are the authorized bodies. Judge Alvarez contends that 'Up to the present, this juridical conscience of peoples has been reflected in conventions, customs and the opinions of qualified jurists',<sup>2</sup> but that, recently, profound changes have occurred in this arrangement. Custom, he thinks, has tended to give place as a form for the expression of the juridical conscience of peoples primarily to 'the resolutions of diplomatic assemblies, particularly those of the United Nations and especially the decisions of the International Court of Justice', and also to 'the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, the works of the Codification Commission set up by the United Nations, and finally, the opinions of qualified jurists'.<sup>3</sup>

We would agree with Judge Alvarez (if this is his meaning) that the exigencies of modern life have tended to give greater prominence to 'the general principles of law recognized by civilized nations' than to custom as a source of international law. Probably there is no better example of this tendency than the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case itself. But an error seems to lie in confusing—or at any rate not clearly distinguishing between—the sources of international law and the means of determining the rules of international law.<sup>4</sup> In our view, while it would be true to describe Resolutions of the General Assembly as 'subsidiary means for the determination of rules of law' within the meaning of Article 38 (1) (d) of the Statute of the International Court of Justice, it would be wrong to ascribe to them a higher status than that or to imply that they are in themselves sources of international law. Moreover, it is impossible to disregard the fact that this particular provision of the Statute of the Court contains no reference to Resolutions of the General Assembly, although it does refer to 'judicial decisions' and even to 'the teachings of the most highly qualified publicists of the various nations'. This has not necessarily the consequence that Resolutions of the General Assembly are not 'subsidiary means for the determination of rules of law'. But it has the consequence that as means of determining the rules

<sup>1</sup> Individual Opinion in the *Fisheries Case* (I.C.J. Reports, 1951, p. 148).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., p. 149.

<sup>4</sup> On this point see the distinction drawn by Schwarzenberger between the 'sources' and the 'law-determining agencies' of international law: *International Law*, vol. i—*International Law as applied by International Courts and Tribunals* (2nd ed., 1949), p. 8.



of international law they are very 'subsidiary' indeed. This status as relatively subsidiary means for the determination of rules of international law; and this status alone, it is submitted, is the 'legal effect' of Resolutions of the General Assembly.

There are some, no doubt, who consider it contrary to principle that, in the hierarchy of means of determining the rules of international law, such a comparatively lowly place should be given to the Resolutions of the most representative organ of the United Nations. This sentiment leads sometimes to a dangerous line of reasoning which says that, although admittedly the General Assembly is neither a legislature nor a court, yet it partakes of the character of both. Here, however, the wish would seem to be father to the thought and the reasoning contrary to all sound principles of jurisprudence. It is submitted that neither a common lawyer nor a civilian could tolerate a situation in which greater value was attached to the Resolutions of what is essentially a standing diplomatic conference<sup>1</sup> than to the weight of judicial decisions (*jurisprudence*) or to the consensus of opinion of learned commentators on the law (*doctrine*). Moreover, it must not be forgotten that a process of attaching greater weight to Resolutions of the General Assembly would finish by detracting from the importance both of judicial decisions and of treaties. What would be the purpose of proceeding to the conclusion and ratification of treaties if the mere adoption of a Resolution were sufficient to create international rights and duties? What chance in these circumstances would there be of developing international law through a coherent system of case law, as the General Assembly itself has recommended?<sup>2</sup>

This does not mean that we disagree with the view expressed by Judge Lauterpacht—and possibly also by Judge Klaestad—to the effect that, even though the element of 'true obligation' may be lacking, there may be a certain minimum of legal duty or 'legal relevance' about Resolutions of the General Assembly. In the hypothetical example which we have assumed, that of a Resolution of the General Assembly addressed to a single Member of the United Nations, which has voted against it, 'recommending' that Member to act, or to abstain from acting, in a certain way, we would even concur with Judge Lauterpacht that there may be a particular legal relevance about 'a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly'.<sup>3</sup> But here it is necessary to distinguish. It may be that the course which the General Assembly is 'recommending' is already clearly obligatory under international law. In that event it would not be

<sup>1</sup> Perhaps an even more suitable expression is 'diplomatic assembly'. See the citation from Judge Alvarez at p. 116, above.

<sup>2</sup> Resolution 171 (II) of 14 November 1947.

<sup>3</sup> *I.C.J. Reports*, 1955, p. 120.



strictly true to ascribe to the Resolution of the General Assembly a 'legal effect', even though the Member concerned might be legally obliged to comply with the terms of the Resolution. If, however, the course which the General Assembly is 'recommending' is not already clearly obligatory under international law, then the vital question which arises is whether a Resolution, or a succession of Resolutions, by the General Assembly can render it so.

It is admittedly not easy to answer this question, but we suggest that it should be answered along the following lines. The answer cannot be a firm positive, because that would be to turn the General Assembly into both a legislature and a judge, and, moreover, a judge in its own cause. But equally the answer cannot be a firm negative, because that would be to deny that Resolutions of the General Assembly can be even a subsidiary means for determining the rules of international law—whereas it has been suggested that they amount at least to that. The answer must, therefore, be that, in such circumstances, the Resolutions of the General Assembly would be elements indicative of the law, which an international court could take into account in determining whether there had been a breach of international law by the State concerned.

It may be that Dicey's maxim that 'the law of every country . . . consists of all the principles, rules or maxims enforced by the courts of that country'<sup>1</sup> is not fully applicable in the international sphere because it stresses the enforceability of the law rather than the duty to obey it. At the same time, it serves to remind us of the vital role played by the courts in any legal system. Nowhere in the international legal system is this role more important than in those spheres—of which there are so many—where the law has, as Justice Cardozo so rightly says, 'a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality'.<sup>2</sup> This statement contains a profound truth because it insists that the central deficiency of the international legal system is not so much the absence of a legislature as the absence of a court with a really compulsory jurisdiction. Efforts to confer by way of interpretation a greater power on the General Assembly than the Members of the United Nations have so far clearly intended to give it are misplaced. In the first place, they distract attention from the need to strengthen the international judicial machinery. Secondly, they tend to distort the role of the General Assembly itself.

This role is to act, at any rate in part, as a means by which the juridical conscience of civilized peoples can express itself. This conscience, however, cannot properly express itself in an atmosphere of undue haste or under other unfavourable conditions, such as those referred to by Judge Lauter-

<sup>1</sup> *Law Quarterly Review*, 6 (1890), p. 3.

<sup>2</sup> *Loc. cit.*

pacht. Nor, above all, can it satisfactorily express itself when the General Assembly is concerned, not primarily with the conduct of the generality of States, but with the conduct of one particular State in one particular situation. We do not say that a Resolution adopted in such circumstances can never be a means for determining the rules of international law. What we do say is that it is likely to be—and would almost certainly be found by a court to be—a less satisfactory means of determining the law than a Resolution carried in circumstances of greater objectivity. We believe that a greater realization of this truth might do much to assist the General Assembly in the furtherance of the beneficent objects which it often has in mind.

With regard, finally, to the term 'moral effect' as applied to Resolutions of the General Assembly, there is, as was shown by some of the citations given in the previous two sections, a tendency to contrast it with 'legal effect' and to equate it with 'political effect'. Any such tendency is erroneous and misleading. It is erroneous because moral science and political science are distinct and separate branches of knowledge. It is misleading because it suggests that a 'moral effect', being more or less equivalent to a 'political effect', is something fundamentally different from a 'legal effect'. Whereas the question whether a State is morally bound to follow a certain course is—it is submitted—far more closely connected with the question whether it is legally bound to follow that course, than it is with the question whether it is politically compelled<sup>1</sup> to follow that course. This contention, which is clearly implicit in the passages from Judge Lauterpacht's Opinion that have been quoted above, we shall now endeavour to substantiate.

There are not many modern writers, it seems, who attempt to cover the spheres both of international morality and of international law. For the most part writers on international morality seem concerned less with its relations with international law than with such problems as the difference between the morality of a group and the morality of an individual, and with the meagre use, or rather the abuse, of the canons of morality by statesmen, politicians, and diplomats. But there are exceptions.<sup>2</sup> One writer even describes international law as 'customary international morality crystallized'.<sup>3</sup> Also, as Kraus showed in a series of lectures delivered in 1927, 'Il y a en effet, de très nombreux points de contact et de multiples recouplements entre la morale internationale, d'une part, le droit des gens et surtout la politique du droit international public, d'autre part.'<sup>4</sup> It will

<sup>1</sup> The word 'compelled' rather than 'bound' is used advisedly here lest it should be thought that there is any intention of reopening the question, discussed at pp. 114-15 above, whether there can, strictly speaking, be a 'political obligation'.

<sup>2</sup> For example, Sidgwick, *The Elements of Politics* (1891), pp. 272-84, and Schwarzenberger, *Power Politics* (1951), pp. 202-31.

<sup>3</sup> Woolf in *International Journal of Ethics*, 26 (1915), p. 19.

<sup>4</sup> *Recueil des Cours*, 16 (1927) (i), p. 390.



suffice to mention only a few of these points of contact, such as the doctrine of abuse of rights, the principle of good faith, the principles of humanity in time of war, and the principle of the treatment of foreigners in time of peace according to certain minimum standards of justice.

It seems that there is a fairly constant tendency of the human mind to prescribe different standards of conduct in the affairs of men, some being higher, or lower, than others. For instance, it is a remarkably consistent feature of authorities of the Christian tradition to supplement the standards of justice (a moral virtue) with those of charity (a theological virtue), the latter being regarded as a higher virtue than the former.<sup>1</sup> It may be that, for the ordinary purposes of his science, the international lawyer can afford to ignore the precepts of charity, although even here it is submitted that few lines of research would be more worth conducting, and possibly more surprising in their results, than a survey of those occasions on which the rulers of States have been guided in their relations with other States at least in part by considerations of charity. But the international lawyer can never ignore the standards of justice or morality, partly because these standards, though higher than legal standards, are the basis of his own system, and partly because the points of direct contact between the science of international morality and the science of international law can easily be shown to be numerous.

International morality is merely that branch of moral science which 'governs the conduct of men and, more especially, of rulers, in their international relations'.<sup>2</sup> If, moreover, it be true that international law is rooted ultimately in the 'juridical conscience' of humanity, and if this 'juridical conscience' has in turn been correctly defined as 'the sense of what is juridically right or wrong',<sup>3</sup> then it is no exaggeration to say that international law is the social application of the principles of international morality.<sup>4</sup> This explains, we believe, why it is often so difficult to draw a precise line between 'legal obligations' and 'moral obligations'—of which difficulty Judge Lauterpacht's Separate Opinion, and to some extent Judge Klaestad's, are such excellent examples.

Moral principles are principles which are discoverable by the light of natural reason.<sup>5</sup> Unlike principles of law, they do not require to be deter-

<sup>1</sup> See, for instance, St. Paul, *Romans*, xiii. 10; St. Thomas Aquinas, *Summa Contra Gentiles*, Lib. III, Caps. cxxviii–cxxx; and Pope Benedict XV, Encyclical *Pacem Dei Munus* of 23 May 1920.

<sup>2</sup> This is actually the definition of 'international ethics' contained in the *Code of International Ethics*, compiled by the International Union of Social Studies (translated and edited by J. Eppstein, 1953), p. 42.

<sup>3</sup> Bin Cheng, *op. cit.*, p. 8.

<sup>4</sup> As has been said, 'les liens unissant le droit à la morale' are so close that 'il existe entre ces deux disciplines une interdépendance tellement rigoureuse qu'on a pu dire de la première qu'elle était une "espèce" de morale, mais une "morale sociale" . . . le droit est la réalisation sociale de la morale' (Castanos, *Critique du droit international public moderne* (1953), pp. 91–93).

<sup>5</sup> See above, p. 112, n. 1



mined or promulgated by social agencies. The Resolutions of the General Assembly may affirm—indeed sometimes have affirmed<sup>1</sup>—principles of morality, but it can hardly be said of such Resolutions that they have a ‘moral effect’. Regrettably, as we have shown, this term is sometimes wrongly used as if it were synonymous with ‘political effect’. Worse still, it is often employed to give the meaning of virtually no effect at all, as in the cliché ‘only a moral effect’.

We have already seen, in the case of international law, that a Resolution cannot properly be described as having a ‘legal effect’ merely because the course which the General Assembly ‘recommends’ is already obligatory under international law. Similarly, it would not be true to ascribe to a Resolution of the General Assembly a ‘moral effect’ merely because the State to which it was addressed was already morally bound to comply with the terms of the Resolution. It can only be concluded, therefore, that the term ‘moral effect’, when employed in connexion with Resolutions of the General Assembly, has no useful meaning at all.

#### 4. *Conclusions*

The conclusions of this article may be summarized as follows:

- (1) The term ‘moral effect’, when employed in connexion with Resolutions of the General Assembly of the United Nations, has no valid meaning at all. The term is, however, often wrongly used when it is intended to convey the meaning of ‘political effect’.
- (2) A Resolution of the General Assembly, an international political body, has always some ‘political effect’. It has such an effect, particularly, when, being addressed to a certain Member or Members of the United Nations, those Members run the risk of losing the political friendship and understanding of their fellow Members who voted for the Resolution if they fail to follow the course ‘recommended’ in the Resolution. A Resolution also has a ‘political effect’ if it succeeds in affecting the bond between the Government of a State and its own subjects.
- (3) Many Resolutions of the General Assembly, such as those concerned with the internal working of the United Nations Organization, have a full ‘legal effect’ in that they are binding upon both the Members and the organs of the Organization. These Resolutions create obligations and legal situations which did not exist before. There is also nothing to prevent Members incurring binding legal obligations by the act of voting for Resolutions in the General Assembly, provided there is a clear intention to be so bound. ‘Recommendations’ of the

<sup>1</sup> E.g. Resolution 96 (I) of 11 December 1946 affirming that genocide is ‘contrary to moral law’.

General Assembly addressed to Members who have voted against them have, however, a 'legal effect' only in the sense that they may constitute a 'subsidiary means for the determination of rules of law' capable of being used by an international court. They are not in themselves sources of law. Their value, even as means for the determination of rules of international law, depends upon the degree of objectivity surrounding the circumstances in which they were adopted. In particular, it depends upon the extent to which they can be regarded as expressions of the 'juridical conscience' of humanity as a whole rather than of an incongruous or ephemeral political majority.

# THE SIGNIFICANCE OF *THE ASSUNZIONE*

By G. C. CHESHIRE

THE purpose of this short article is to suggest that it would be difficult to exaggerate the importance of the decision of the Court of Appeal in *The Assunzione*,<sup>1</sup> which appears, after many years of development and controversy, to have crystallized the doctrine of the proper law of the contract. It has at last authoritatively imbued with a sense of reality a doctrine that for too long has been bedevilled by artificiality and obscured by the repetition of aphoristic pronouncements, lacking nothing in ambiguity. The aphorism, or the expression of a general principle in the form of a pithy incantation, is congenial to the learned in any profession. If sufficiently impressive, and especially if veiled in the Latin language, it acts as a narcotic and lulls the brain into a comfortable state of uncritical acceptance. The law is no exception. It abounds with epigrammatic statements, most of which are misleading half-truths and some of which are inaccurate. Many examples leap to the mind. 'If any part of the consideration is illegal, there can be no severance'; 'all monetary laws are territorial'; '*ex turpi causa oritur non actio*'; '*nemo dat qui non habet*'; '*mobilia sequuntur personam*', and so on.

The particular incantation with which the present remarks are concerned is one that has been a commonplace of most judgments on the proper law for at least the last ninety years. It is not always framed in absolutely identical terms, but a typical example is a statement of Lord Atkin in a leading case where he described the proper law quite shortly as 'the law which the parties intended to apply'.<sup>2</sup> This statement has, indeed, the merit of simplicity, but regarded dispassionately—what does it mean? It clearly envisages the case where the parties have expressly chosen the law to which they are willing to submit themselves. But if, as occurs in the vast majority of cases, there has been no express declaration of intention—what then? How is the so-called common intention to be discovered? It is no easy task, for parties seldom give the question of the governing law a single thought. How is it possible for them to have formed an intention about something to which their minds have never been addressed? There are only two ways of escape from the impasse.

First, the judge may attempt to infer what law the parties would have chosen had they considered the matter at the time of the contract. Working on this hypothesis he must declare what identical intentions they would clearly have formed. Thus in *Lloyd v. Guibert*,<sup>3</sup> the *fons et origo* of this

<sup>1</sup> [1954] P. 150.

<sup>2</sup> *Rex v. International Trustee*, [1937] A.C. 500, 529.

<sup>3</sup> (1865), L.R. 1 Q.B. 115, at p. 120.



subjective doctrine, or the theory of the presumed intention as it is generally called, Willes J. said:

'It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter.'

If this is the correct procedure, then the doctrine of the proper law rests upon the theory of an implied term, just as, according to one view, does the doctrine of frustration in domestic English law. If it must necessarily be presumed that both parties, had the question been put to them, would have regarded the contract as subject to the law of country *X*, then a tacit term to the effect is read into the contract. To ask a judge to proceed along these lines is, indeed, to present him with a task of which he might justly complain. The difficulty of inferring intention is great enough when the inquiry relates to the hypothetical intention of one man, but it assumes alarming proportions when the judge is required to speculate upon an intention common to two or more parties.

Unless he can satisfy himself that both parties would have chosen the law of *X*, his decision in favour of that law will not have been given in accordance with the theory of the presumed intention. The magnitude of the task becomes even more apparent when, as happens in all disputed cases, one party vehemently repudiates the undeclared intention advocated by his opponent. This was stressed by Birkett L.J. in *The Assunzione*:<sup>1</sup>

'If parties do express in their contract the law by which they desire the contract to be governed, well and good; but if as in this case (and I rather gather in the majority of the cases) no thought whatever is given to it, and it is said to a court, "You have to discuss and ascertain, if possible, what it would have been if these people had really considered it," then the situation arises, [counsel for the plaintiffs] saying with great force; "I cannot conceive the plaintiffs in this case ever agreeing to Italian law under any circumstances," and [counsel for the defendants] saying with equal force: "In view of the matters which I have put forward, I cannot conceive the defendants in this case ever accepting French law."'

Yet, such opposing contentions must not deter the judge. He must still give a decision and, if the present theory is correct, he must assure the contracting parties that he is merely fulfilling what they would both have agreed. Thus, as in the frustration cases, the so-called common intention that has supposedly been formed will more often than not be common only in name. Would, for instance, the plaintiff in *Kahler v. Midland Bank*<sup>2</sup> have agreed at the time of the contract that his right to call for possession of his shares deposited in a London bank should be regulated by the law of Czechoslovakia?

The alternative theory, the alternative explanation of what is meant by

<sup>1</sup> At pp. 185-6.

<sup>2</sup> [1950] A.C. 34.

the phrase 'the law intended by the parties', is that the judge does not speculate upon what both parties *would* presumably have intended, but decides what as reasonable men they *should* have intended had they addressed their minds to the question at the time of the contract. This is a fundamentally different line of approach. Instead of adventuring into the misty realm of conjecture, the judge mounts the Clapham bus and applies the objective and external standard of the reasonable man. The contract is regarded as a whole. It is scrutinized in the light of its terms and the surrounding circumstances in order to ascertain the country with which it has the most enduring factual links, for this will indicate the law to which it naturally belongs and by which on the score of reason it should be governed. This theory, as a New York judge remarked, 'assumes that it is the grouping of the various elements which have gone to make up the contract that determines which law governs'.<sup>1</sup> In the more familiar language of Westlake, the governing law is selected 'on substantial considerations, the preference being given to the country with which the transaction has the most real connection',<sup>2</sup> a description which was repeated by Lord Simonds in even more precise language in *Bonthyon v. Commonwealth of Australia*.<sup>3</sup>

According to this theory, the court imposes a solution on the parties irrespective of what law one of them would have preferred. Its justification is that they themselves have by their own acts localized the contract in the sense that by establishing a number of connecting factors with this or that country they have placed its centre of gravity in the country where those factors are most enduring and most impressive. In *The Assunzione*, for instance, the contract by which a ship was chartered for the carriage of grain from Dunkirk to Venice disclosed both French and Italian elements. The charterers were French, the contract was made in Paris, the bills of lading were written in the French language, as also was a supplement to the charterparty itself. On the other hand, the ship flew the Italian flag and belonged to Italian nationals; Italy was the place fixed for delivery of the cargo; freight and demurrage were payable at Naples in Italian currency; the bills of lading had been endorsed to the consignees in Italy. On these facts the Court of Appeal had little difficulty in deciding that the contract was more substantially connected with Italy than with France. The parties, having created the elements of the contract, the place of payment, and so on, were taken to have intended that the natural consequences of their acts should ensue, one of which was that their rights and obligations should be governed by the law of the country in which they had most closely grouped the contractual elements.

<sup>1</sup> *Jones v. Metropolitan Life Insurance Co.* (1936), 286 N.Y. Supp. 4.

<sup>2</sup> *Private and International Law* (5th ed.), section 212.

<sup>3</sup> [1951] A.C. 201, 219.



These two theories, the subjective and the objective, cannot live together. They cannot both be correct, though curiously enough Lord Wright seems to have equated them in a well-known passage, where he said:

'The Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they *ought* to or *would have* intended if they had made the contract.'<sup>1</sup>

The general tenor of this statement is that the court imposes a just and reasonable solution upon the parties, but this is a little obscured by the use of the words 'would have', which imply that it is the presumed and common intention that is relevant.

Nevertheless, although the two theories cannot both be right, it must be confessed that in actual practice it will not make an iota of difference to the actual decision of a contested case which of them is regarded as correct. It is a commonplace of the subjective theory that, although the alleged search is for the presumable intention of both parties, yet this must be inferred by the court from the terms of the contract and the relevant surrounding circumstances. According to both theories, the terms and circumstances are the decisive consideration. These indicate what law the parties *would* have chosen had they thought of the problem, or what law they *should* as reasonable men have agreed to abide by. In other words, whether the judge pays lip-service to the presumed intention of the parties, or whether he openly applies the external standard of the reasonable man, his decision will be the same. Cook, indeed, came to the conclusion that 'the presumed intention theory seems on the whole to be a somewhat cumbersome and misleading way of expressing a rule that the law to be applied is that of the State with which the transaction on the whole has the most substantial or vital connexion'.<sup>2</sup>

This, then, is an apparent anti-climax, and it may be thought that the present discussion is an academic storm in a teacup. If the same conclusion will be reached whichever theory is affirmed, is not the correct basis of the doctrine of the proper law a matter of complete indifference? The submission, however, is that for the following reasons it is a matter of no little importance.

1. A decision given on the basis of the presumed intention of the parties will more generally than not give an air of falsity to the proceedings and will be calculated to breed distrust for the impartiality of the judge. If it is alleged that the single object is to discover the common intention, it is unfortunate that there should be imposed upon one party a solution that he obviously would have rejected had the matter been discussed at the time

<sup>1</sup> *Mount Albert Borough Council v. Australasian Temperance & General Life Assurance Soc. Ltd.*, [1938] A.C. 224, 240; italics supplied.

<sup>2</sup> *Logical and Legal Bases of the Conflict of Laws*, p. 418.



of the contract. It is one thing to assert that having regard to the circumstances the contract belongs naturally to a certain law and that the protesting party must accept the inevitable; but it is quite another to suggest that he obviously would have chosen the same law had he considered the matter. The former suggestion would be accepted with resignation, the latter with resentment.

2. If the correct inquiry is into the presumed intention of both parties, cases may arise in which logically the identity of the proper law is undiscoverable. Suppose that, though the matter was never canvassed between the parties, yet there is clear evidence that one of them discussed it with his advisers and was assured that he would be subject to the law of country Y, a country with which it could not reasonably be said that the contract was most closely connected. In such a case a decision would be given in accordance with all the facts and circumstances, but it could not affect to be a fulfilment of any supposed common intention. It is scarcely sensible to presume a non-existent fact or to assert that what is false is true.

3. The implied term that results from an application of the subjective theory is a fiction. It is an artificial as opposed to a true explanation of what is being done. Fictions, no doubt, have played a notable part in the early development of the law and may even now serve to modify or extend established principles, but they inevitably imbue the administration of justice with a quite unnecessary aura of make-believe. In the present context, however, such a device is out of place, for, as we have seen, the decision will be the same whether a fictitious or a true reason is given of the manner in which it has been reached. For a judge to pretend to be doing what in fact he is not doing is of little profit to the parties or to the esteem in which the law is held.

4. The doctrine of the proper law is one of the outstanding contributions made by English lawyers to private international law in general, but it is the writer's experience that it is regarded with suspicion by foreign lawyers. This is unfortunate, since it is a doctrine ripe for export at a time when the unification of private international law is much in men's minds, and it may well be that the mystification and distrust felt abroad is due to the confusing and unrealistic manner in which it is often explained. To describe the *lex causae* as the law of the country with which the contract is most closely connected is intelligible enough, but to claim it to be the law which represents the identical intentions of two antagonistic parties is likely to nip in the bud any admiration that our foreign friends may have hitherto felt for the common sense of the common law. To command respect a rule should be explained in a manner consistent with the manner in which it is applied, or in other words in accordance with the truth.

5. Finally, the task of the judge will be simplified and his mind will be

less embarrassed if any suggestion that he must speculate upon the hypothetical intention of two parties is dismissed. It may be difficult enough in some cases to reach a reasonable solution that is dictated by the circumstances, but it is far more perplexing to conjecture upon probabilities.

Thus, we arrive at the crucial question. What is the theory which the judges in fact follow when the proper law has not been expressly chosen by the parties? It is here that the decision of the Court of Appeal in *The Assunzione* assumes its chief significance. It discloses a weighty and probably a decisive endorsement of the objective theory. The judgments, no doubt, contain a few references to presumed intention, but the key passage may be said to be that of Singleton L.J., in which he took his stand upon the judgment of Lord Wright quoted above, but altered it in a slight, though material, respect. It will be recalled that Lord Wright, no doubt inadvertently, combined two incompatibilities—the subjective and the objective theories. He required the Court to ascertain what the parties ought to or would have decided had they considered the identity of the proper law at the time of the contract. Singleton L.J., however, regarded the passage as an authoritative statement of the law as disclosed by the many decisions on the subject, provided that the reference to the presumptive intention, indicated by the words ‘would have’, were omitted. The learned Lord Justice referred to Lord Wright’s speech and then continued as follows:

‘I take a few lines from the middle of that page<sup>1</sup> and omit certain words: “Then the court has . . . to determine for the parties what is the proper law which, as just and reasonable persons, they ought . . . (to) have intended if they had thought about the question when they made the contract.” That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties and generally all the surrounding circumstances.’<sup>2</sup>

Birkett L.J. would appear to have assented to this view. After referring to the familiar presumptions in favour of the *lex loci contractus*, the law of the flag and so on, and after stressing their inconclusive nature, he said:

‘And if the question has to be put in this way—in examining the facts and circumstances of this case how would just and reasonable men have been supposed to declare their intention?—then, of course, the facts assume the greatest possible importance.’<sup>3</sup>

Moreover, the decision itself, which was in favour of Italian law, stresses that the Court did not purport to give effect to what both parties would have accepted as the proper law had they discussed the matter, for, as we have seen, the plaintiffs vehemently repudiated the suggestion that they would have agreed to submit themselves to Italian law.

<sup>1</sup> [1938] A.C., at p. 240.

<sup>2</sup> At p. 175. He repeated the formula at the end of his judgment, p. 179: ‘One must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract.’

<sup>3</sup> At p. 180.



If this interpretation of the decision is correct, it can at least be said that one of the most important doctrines of English private international law has been clarified and rendered more intelligible. The issue is at least clear, difficult though it may be to determine in some cases. If the contract has links with two or more countries, it is subject to the law of the country with which the links are more substantial, and more significant. Thus the decision must be given in accordance with the realities of the case, irrespective of what either party might or would have preferred.

Another respect in which the decision deserves particular notice is the attitude that was adopted by the Court towards the presumptions or *prima facie* rules that are supposed to point the way to the identity of the proper law. Their importance was reduced to small proportions by the Lords Justices, and rightly so. Counsel for the French charterers, instead of taking the line that everything turns upon the facts and circumstances considered in their totality, had argued that the presumption in favour of the *lex loci contractus* must be regarded as conclusive unless rebutted by contrary circumstances. Counsel for the Italian shipowners, taking his stand upon the principle that 'the test is what the parties as reasonable men ought to have intended', advanced the opposite view. His argument was that the Court must not invoke a presumption unless and until a consideration of all the facts and circumstances has failed to disclose with sufficient certainty what a reasonable man ought to have decided. The Court of Appeal preferred the latter argument. To have preferred the argument for the charterers would, indeed, have been inconsistent with the objective theory. If the inquiry relates to what the parties ought to have intended as revealed by all the circumstances, it would be wrong to attribute special significance to a particular presumption, such as that in favour of the *lex loci contractus* or the law of the flag. It would divert attention from the necessity to consider every single fact and circumstance. The presumptions fashioned by the Victorian judges have no doubt played their part in the evolution of the doctrine of the proper law, but now, when it is established that the contract must be scrutinized as a whole, reliance should be placed upon them, as Hodson L.J. said, only in the last resort, 'when the evidence is so evenly balanced that the court cannot otherwise reach a fair and just conclusion'.<sup>1</sup>

<sup>1</sup> At p. 194.



# COLLECTIVE SELF-DEFENCE UNDER THE CHARTER OF THE UNITED NATIONS

By D. W. BOWETT, M.A., LL.B., PH.D.

THE frustration of the Security Council as an organ responsible for the maintenance of international peace and security has brought about an important shift of emphasis in the Charter of the United Nations. Article 51,<sup>1</sup> preserving to Members of the United Nations their 'inherent right of individual or collective self-defence', was framed as the exception to the restriction on the use of force contained in Article 2 (4), an exception which justifies resort to force by the individual State as a provisional measure pending the taking of enforcement action by the centralized machinery; it has emerged rather as the general basis upon which the new structure of decentralized security systems can be built. It is the purpose of this article to examine the scope and meaning of the concept of 'collective self-defence' and to see to what extent the treaty arrangements concluded in recent years for the purpose of ensuring the security of States within defined regions can be based upon the right of collective self-defence as recognized and regulated by the Charter.

The term 'collective self-defence' is not defined in the Charter; indeed, it has been criticized as embodying a contradiction. Kelsen<sup>2</sup> argues that, since self-defence involves action which is by definition unilateral in character, to speak of 'collective' self-defence is to indulge in self-contradiction; for him the right of self-defence 'is the right of the attacked or threatened individual or State, and of no other individual or State'. For similar reasons, other writers have preferred to call the right 'not self-defence, but defence of another State'.<sup>3</sup> The essential problem is, however, not one of terminology but one as to the scope of the action which the Charter intended that individual States or groups of States should be allowed to take without the prior authorization of the Security Council.

<sup>1</sup> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

<sup>2</sup> *Law of the United Nations* (1950), pp. 792, 797. See also Elihu Root, 'Observations on the Monroe Doctrine', in *American Journal of International Law*, 17 (1913), p. 616.

<sup>3</sup> Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations', in *American Journal of International Law*, 41 (1947), p. 875. And see Stone, *Legal Controls of International Conflict* (1954), p. 245: *contra* Beckett, *The North Atlantic Treaty*, &c. (1950), p. 13.

In this connexion the *travaux préparatoires* afford some guidance, for the discussions at San Francisco in Committee III/4<sup>1</sup> indicate that the term 'collective self-defence' was used to cover action not only by members of regional arrangements in the proper sense of that term, but also by parties to bilateral treaties governing their joint security and even assistance by one State to another without any treaty obligation. This, it is submitted, is the correct view, for if a right of collective self-defence exists it cannot depend on the degree of organization or of treaty relationship which the States have perfected, but must depend on the existence of certain substantive rights for which the treaty serves as a medium of protection. On this issue, of what are the substantive rights involved, the Charter has nothing to say in Article 51.

It is necessary first to ascertain the meaning of the concept of collective self-defence in general international law, not solely because of the absence of definition in the Charter but also because the effect of Article 51 is to recognize pre-existing rights, not to create new rights. It is a fallacy of the first order to assume, with Kelsen, that 'the right has no other content than the one determined by Article 51';<sup>2</sup> such a view produces a restricted interpretation of the right not warranted by the Charter. Not least of the restrictions involved in this view is the construction of Article 51, which limits the right of individual or collective self-defence to cases where an 'armed attack occurs'.<sup>3</sup> This is a restriction certainly unrecognized by general international law, which has always recognized an 'anticipatory' right of self-defence. In any event, since Article 51 is enabling, it is rather to Article 2 (4)<sup>4</sup> to which we must turn for the restriction on existing rights, and the latter clause does not produce the result assumed by Kelsen. Clearly, it has to be presupposed that rights formerly belonging to Member States continue except in so far as obligations inconsistent with those

<sup>1</sup> United Nations Conference on International Organization (U.N.C.I.O.), Docs., vol. xii, pp. 680-2. See especially the views of the Colombian delegate (p. 680), the French delegate (p. 681), and the Egyptian delegate (p. 682).

<sup>2</sup> *Recent Trends in the Law of the United Nations* (1951), p. 914. See also Nguyen Quoc Dinh in *Revue générale de droit international public*, 19 (1948), p. 244.

<sup>3</sup> This restricted view is taken by Kelsen, *Law of the United Nations*, p. 269; Beckett, op. cit., p. 13; Wehberg, 'Interdiction du Recours à la Force', in *Recueil des Cours*, 1951 (i), pp. 70, 81; Pompe, *Aggressive War an International Crime* (1953), pp. 98, 100; Tucker, 'The Legal Interpretation of War', in *International Law Quarterly*, 1950, at p. 29; Stone, op. cit., p. 244 (though with qualifications). This view has not been taken by Goodrich and Hambro in their Commentary, *The Charter of the United Nations*, 2nd ed. (1949), p. 301; Waldock, 'The Regulation of the Use of Force by Individual States in International Law', in *Recueil des Cours*, 81 (1952), p. 455, at pp. 500-1, relying on the interpretation of the Judgment of the International Court of Justice in the *Corfu Channel* case (Merits): *I.C.J. Reports*, 1949, p. 31; the United Nations Atomic Energy Commission in their *First Report*, 1946 (U.N. Doc. AEC/18/Rev. 1, p. 24).

<sup>4</sup> 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'



existing rights are assumed under the Charter. Goodhart has rightly said that:

'The Members of the United Nations when exercising their inherent powers do so not by grant but by already existing right. The Charter limits the sovereign rights of the states; it is not a source of those rights.'<sup>1</sup>

For this reason it is of first importance to discover the meaning of the right of self-defence apart from the Charter. It is therefore now proposed to examine the views of writers as to the basis of the right of collective self-defence under general international law, for they may give an indication, lacking in the Charter, as to the nature and scope of the right referred to in Article 51.

### A. *The theory of the collective right of self-defence*

So far as can be ascertained, there are three different theories as to the proper basis of the right. In the first place there is the view that the right is based on the analogy with private law. Baty states:

'That self-defence, when legitimate, need not be limited to one's own defence, but may extend to the defence of states unjustly attacked, appears to follow from the analogy of private law.'<sup>2</sup>

On similar reasoning Le Fur states:

'Le droit de légitime défense, entre Etats comme entre individus, ne vise pas seulement la défense personnelle, mais aussi celle d'autrui.'<sup>3</sup>

A survey of the provisions of some of the main systems of law on this point would seem to bear out the analogy which these writers seek to draw. The English Common Law clearly recognizes the defence as going beyond the defence of one's own person or property, although the cases suggest there must be some relationship between the person attacked and the person who assists in his lawful defence.<sup>4</sup> The American Restatement on the Law of Torts again both recognizes the right and limits it to the defence of those who are members of one's household, or those whom one is under a legally

<sup>1</sup> 'The North Atlantic Treaty of 1949', in *Recueil des Cours*, 79 (1951), at p. 192.

<sup>2</sup> *Canons of International Law*, p. 99. And see Giraud, 'La Théorie de la Légitime Défense', in *Recueil des Cours*, 49 (1934), at pp. 707 ff., for a comparison between private law and international law.

<sup>3</sup> 'Guerre Juste et Juste Paix', in *Revue générale de droit international public*, vol. 26, p. 74. And see Fiore, *Diritto Internazionale*, Sects. 241, 242, justifying collective intervention to protect the rights of strangers; Phillimore, 'Droits et Devoirs des Etats', in *Recueil des Cours*, 1 (1923), p. 45. Descamps, 'Le Droit International Nouveau', *ibid.*, 31 (1930), p. 399, at p. 475, takes the same view and cites the Belgian Penal Code, Article 416, in support.

<sup>4</sup> See *Russell on Crime*, 10th ed. by Turner, vol. i, p. 763; *Leward v. Basely*, (1694) 1 Ld. Raym. 62, wife's defence of husband; *Tickel v. Read*, (1772) Lofft. 215, master's defence of servant.



or socially recognized duty to protect.<sup>1</sup> Article 328 of the French Criminal Code provides:

'Il n'y a crime, ni délit lorsque l'homicide, les blessures et les coups étaient commandés par la nécessité actuelle de la légitime défense de soi-même ou d'autrui.'<sup>2</sup>

There would seem little question that, on the analogy of private law, the right is both individual and collective, and since 'general principles of law'<sup>3</sup> may be regarded as a legitimate source of public international law, the analogy serves to support the theory of the existence of a 'collective' right of self-defence. Of immediate interest, however, is the fact that the right is limited to those cases where there exists some sort of proximate relationship; the right extends to the defence of one's family, one's servants, and to those persons whom one is under a recognized duty to protect. These cases seem to presuppose an interest which the person has a right to defend, whether it is his interest in the integrity and well-being of his family or of his servants; in Roman law the interest was confined to those cases where the 'protector' had rights of dominion over the persons he sought to protect in self-defence.<sup>4</sup> It is this element which distinguishes self-defence from action taken to defend some complete stranger in whose well-being the 'protector' has no special interest, for in the latter case, if the 'protector' intervenes to defend the stranger it is by virtue of some duty imposed by the law to prevent a breach of the peace or grievous wounding;<sup>5</sup> it is not by virtue of a right of self-defence, either individual or collective. Even in the absence of a duty of positive action, assistance to the stranger is never a matter of 'right', but rather a 'privilege' which the law neither prohibits nor recognizes as a right. The essential difference between these two cases is that when self-defence is exercised the 'protector' can show a violation of his own interests in his family or servants; in protecting the stranger there is no interest of the 'protector' which has been violated so as to actuate the 'right' of self-defence, and such action as he takes is legally of a different order. If this analysis is correct, then when we carry the analogy into the international sphere it follows that the 'collective' right will exist where the State invoking the right can show some interest of its own which is violated by the attack launched upon another State. We must

<sup>1</sup> Sect. 76.

<sup>2</sup> See Garraud, *Précis de droit criminel*, 5th ed., Recueil Sirey, 1934, pp. 327-40. It is not clear from Garraud whether the right extends to third persons generally or is limited to persons within defined relationships to the defendant.

<sup>3</sup> Article 38 of the Statute of the International Court of Justice. See Stuyt, *The General Principles of Law* (1946); and Bin Cheng, *General Principles of Law* (1953). See also Lauterpacht, *Private Law Sources and Analogies of International Law* (1927).

<sup>4</sup> See Sohm, *Institutes of Roman Law*, 3rd ed., p. 224. Wrongs to persons or their property under the potestas of the paterfamilias were considered to be wrongs to the paterfamilias: Buckland, *Text-book of Roman Law* (1921), p. 104.

<sup>5</sup> As is the case in English law: 2 Hawkins, *Pleas of the Crown*, c. 12, s. 1. See Archbold, *Criminal Pleading, Evidence and Practice*, 33rd ed., p. 1074.

similarly presuppose a 'proximate relationship'—not necessarily in terms of geographical contiguity—which makes a direct violation of the rights of one State an indirect, but nevertheless real, violation of the rights of another State which comes to the former's aid by virtue of the right of collective self-defence.

The second theory as to the basis of the collective right is one which is based upon the concept of a duty to maintain international peace and to redress a violation of the rules of international law.<sup>1</sup> As Redslob puts it:

'Le devoir de maintenir la paix, d'une part, et l'obligation de redresser la norme violée de l'autre, convergent et s'unissent dans le précepte de soutenir la légitime défense d'autrui.'<sup>2</sup>

This theory meets with certain difficulties, for the existence of such duties in international law is highly questionable; Redslob himself frames this postulate under the general heading of 'Une Doctrine Marginale', and it appears to be a concept which goes beyond what the actual relationships of States would justify. Moreover, as Stowell has pointed out,<sup>3</sup> so long as the duty of vindicating the law depends on the sovereign decision of each State as to how and when this obligation shall be fulfilled, the content of such a 'duty' is problematical. The provisions of Article 16 of the Covenant of the League of Nations, and of the Kellogg-Briand Pact of 1928,<sup>4</sup> in which Redslob finds support for his thesis, can scarcely be held to have imposed a duty on signatories to vindicate a breach of the obligation contained in the Covenant and the Pact. Nor is it considered that the present

<sup>1</sup> The conclusion is almost inescapable that any postulation of a duty to maintain international peace, as a basis of the right of self-defence, is based upon the theory of the just war. Until any particular act of force by a State can be classed as either a delict or a sanction, the postulate of such a duty seems an anomaly in the legal system. The existence of such a duty would make all treaties of assistance merely declaratory of existing international law; it cannot be supposed that, at least prior to the Charter, this was the case.

<sup>2</sup> *Traité de droit des gens*, p. 435. See also Grotius, *De Jure Belli ac Pacis*, I, cap. v. 2; Wolff, *Jus Gentium*, in *Classics of International Law*, ed. by Scott (1934), Sect. 656; Vattel, *Le Droit des Gens*, in *Classics of International Law*, ed. by Scott (1916), Bk. II, ch. I, Sect. 4.

<sup>3</sup> *Intervention in International Law* (1921), p. 48. See the somewhat similar doubts of Wehberg, *The Outlawry of War* (1929), p. 99: 'But we ask what law gives a state the right to decide for itself whether the means of violence which it has used are justified by the higher interests of the international community. A state can represent these higher interests only as an organ of the international community.'

<sup>4</sup> See the Preamble to the Pact, which provides that 'any signatory Power which shall hereinafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty'. But see also the statement of Stimson on 30 December 1929: '... the Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor' (*American Journal of International Law*, 25 (1931), Supp., p. 90, n.). This view would seem preferable, and it is difficult to see how the Pact supports Redslob's thesis. Tucker, 'The Legal Interpretation of War', in *International Law Quarterly*, 1950, p. 20, regards the Paris Pact as, in effect, an extension of the right of self-defence by 'permitting other contracting parties the right to collectively assist the state acting in self-defence'. It is difficult to see that the freedom of action which signatories reserved against a State breaking the Pact, by depriving such State of benefits under the Pact, has necessarily anything to do with the right of self-defence, individual or collective.



development of the law justifies the assertion that each State has an interest in the general preservation of world peace, if by the term 'interest' we mean a legally recognized interest which a State may protect by the exercise of self-defence. Lauterpacht has said of the concept of collective self-defence:

'Such extension of the notion of self-defence is a proper expression of the ultimate identity of interest of the international community in the preservation of peace.'<sup>1</sup>

In fact, however, this interest is no more than the general interest (and we use the term without legal significance) which members of any community have in the preservation of peace within that community. If we return to the analogy of private law, it corresponds to the interest which individuals have in the preservation of order and which is expressed when the 'protector' assists the stranger in his defence; it is not such a legally recognized interest as the 'protector' has in his family or servants and which he protects by the exercise of his right of self-defence.

It is, of course, possible for international law to impose duties on States respecting the maintenance of international peace and security, and these would find their analogy in the duties which private citizens in English law have to prevent the commission of felonious or dangerous woundings.<sup>2</sup> To this extent the United Nations Charter contains the first real attempt at reconciling the imposition of such duties with the freedom, which each sovereign State in principle has, to decide when and how such a duty might be fulfilled. This power of decision is delegated to the Security Council, which is invested with 'primary responsibility' for the maintenance of international peace and security, and whose decisions the Member States are, under Article 25, legally bound to accept. The duty to vindicate the law is conditional upon a decision of the Security Council which may, subject to certain provisos,<sup>3</sup> legally oblige a Member to fulfil such a duty. Yet the action which any Member may take in fulfilment of such a duty has little in common with the action it takes in collective self-defence under Article 51. Similarly, although it has been suggested<sup>4</sup> that collective

<sup>1</sup> The quotation is from Oppenheim, *International Law*, vol. ii (7th ed., 1952), p. 155. See Westlake, *International Law*, vol. i, p. 320, for a justification of collective intervention in the support of justice or of the interests of third States so far as consonant with justice. Also Hall, *International Law* (8th ed., 1924), Pearce Higgins, Sect. ii, p. 65. An even vaguer basis than the identity of interest in the preservation of peace is that of the identity of interest of mankind as such. See Descamps, 'Le Nouveau droit international', in *Revue générale de droit international public* (1929), at p. 21, where he states: 'Le péril crée, comme l'on a dit, un lien sacré de confraternité entre les hommes et peut leur imposer le devoir d'assister dans certains cas les victimes d'une injuste agression.'

<sup>2</sup> Kenny, *Outlines of Criminal Law*, 16th ed., by Turner (1952), p. 473.

<sup>3</sup> The legal obligation to participate in sanctions is conditional upon the State being bound by a special agreement under Article 43, upon the conformity of the decision with the voting procedure of Article 27 and possibly also with the Purposes and Principles of the Charter.

<sup>4</sup> Beckett, *The North Atlantic Treaty, &c.*, p. 35.



self-defence is the best means of fulfilling one of the primary Purposes of the United Nations, namely, 'to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace' (Article 1 (1)), this primary Purpose is equally clearly one quite distinct from self-defence; the identification of the two arises from a failure to distinguish the protective right of self-defence from collective sanctions. Stone has rightly said:

'So far is the inherent right of self-defence under Art. 51 from being a means of taking the "collective measures" for the prevention of threats to the peace and the suppression . . . of aggression under Art. 1, paragraph 1, that large-scale resort to it would be rather the clear sign of the defeat of that principle. . . .'<sup>1</sup>

The third theory as to the basis of the collective right is founded on the principle that States may exercise collectively what is undoubtedly their individual right.<sup>2</sup> This, it is submitted, provides by far the most satisfactory explanation of the collective right, for it demands that each participant in the collective action has an individual right of self-defence; the existence of its individual right, which is largely a question of fact in the circumstances, is the condition precedent to the State's participation in its collective enforcement. The analogy of private law supports rather than opposes this view, for the private law requirement of a legally recognized interest is comparable to the requirement that each participating State should possess a legally recognized interest which is violated, either by an attack upon itself or upon its neighbour. Beyond this point, when the participation involves not the protection of the State's own rights or interests, but the protection of the general interest in the maintenance of international peace and in the vindication of international law, such action ceases to fall within the concept of self-defence, either individual or collective. In the absence of a legal duty to protect the general interest in the maintenance of international peace and in the vindication of international law, such action is in the nature of a privilege and not a right; if the legal duty exists, such action is in the nature of a sanction.

The preference for this third theory and rejection of the second is based upon an examination of the possible factual situations which the right of self-defence might embrace, for it is believed that the proponents of the

<sup>1</sup> *Legal Controls of International Conflict*, p. 264.

<sup>2</sup> This same principle justified the exercise of jurisdiction over the major war criminals of the European Axis by the four State signatories of the London Charter of 8 August 1945. See Oppenheim, *op. cit.*, vol. ii (7th ed., 1952), p. 581, and Judgment of the Nuremberg Tribunal, Memorandum of the Secretary-General, A/CN.4/5, 3 March 1949, p. 79. The Judgment is not unambiguous on this question of the legal basis of the Tribunal's jurisdiction, and it is particularly difficult to reconcile this view with the statement at p. 216 (of text given in *American Journal of International Law*, 41 (1947)), although it goes on to state 'they have done together what any one might have done singly'.

second theory confuse situations which are radically different. There are, in final analysis, three possible situations:

- (1) State *A* violates the legally protected interests of State *B*. Here *A* is in breach of an established duty and *B* may exercise the remedial right of individual self-defence.
- (2) State *A* violates the legally protected interests of States *B* and *C*. Here *A* is in breach of an established duty *vis-à-vis* both *B* and *C* and both may exercise their rights of individual self-defence, in which case the position is as in (1) above, *or* may exercise these in concert; this is the position which is properly termed 'collective self-defence'. The essence of this position is that the participants base their action on a violation of their own legally protected rights or interests, and this remains true whether they are two or twenty-two in number.
- (3) State *A* violates the legally protected interests of State *B* only; *B* exercises its right of self-defence and *C* joins in 'collective' action. Here the participant *C* cannot base its action on a breach of its own rights but falls back upon the different concept of a 'duty' to maintain international peace and redress the violated norm. This is in the nature of a sanction and is either a 'duty' or a 'privilege' according to whether international law has imposed a duty of positive action or not.

Whatever be the merits or demerits of the term 'collective self-defence', it is submitted that the particular situation envisaged in (3) above is not one in which the participating State can claim to be acting in self-defence, individual or collective. The full relevance of this distinction between the right of self-defence, exercised collectively, and the administration of sanctions (or perhaps more correctly, so far as the Charter is concerned, the participation in collective measures for the maintenance of international peace and security) is seen when the present position under the Charter is examined.<sup>1</sup> For the moment, however, our contention is simply that a State resorting to force not in defence of its own rights, but in the defence of another State, must justify its action as being in the nature of a sanction and not as self-defence, individual or collective. This contention is based upon the assumption that under the Charter the use of force by States is either (1) authorized by a competent organ of the United Nations—what we should term a sanction,<sup>2</sup> (2) action taken against 'enemy states' under

<sup>1</sup> See *infra*, p. 155.

<sup>2</sup> The term 'sanction' is here used not in the strict juridical sense of a reaction to a delict but in the sense of action authorized by the community of States. It has the latter sense because, under the Charter, the circumstances in which the community may intervene are defined in Article 39 as a 'threat to the peace, breach of the peace, or act of aggression'. These circumstances do not



Article 53 (1) or Article 107, (3) joint action by the permanent members under Article 106, (4) action in the exercise of the right of individual or collective self-defence, or (5) delictual. Excluding categories (2) and (3) as being of a transitional and somewhat anomalous character, this reduces the use of force to the trilogy of sanction, self-defence, and delict.

It can, of course, be argued that the right to go to the assistance of any State acting in self-defence is within the meaning of 'collective self-defence'. This view derives from the assumption that, since States were formerly free to conclude any defensive treaty of alliance and to act on the obligation of assistance contained therein, that freedom or right is still preserved to Member States under Article 51. There are, however, several grounds for disagreeing radically with this view. Firstly, the notion of freedom to conclude and act upon a defensive treaty of alliance developed in an age which knew no prohibition of the State's right to resort to war or to use force, or in which (as under the Covenant) the system of collective security was decentralized. The system under the Charter is radically different, for the Charter contains not only a prohibition of the right to use force or the threat of force but also a system of collective security in which primary responsibility for the maintenance of international peace and security is vested in the Security Council (Article 24), and in which Members agree to accept and carry out the decisions of the Security Council (Article 25). This degree of centralization was never found under the League and it is, therefore, a false analogy which lies at the basis of an argument that because States were free to aid any other State in self-defence under the Covenant, they are therefore free to do the same under the Charter. Moreover, to admit this freedom to lend assistance is to admit that States may, on their own initiative, assess the legality of another State's right to exercise self-defence. This, it is believed, is entirely inconsistent with the whole plan of the Charter, which envisages the minimum of unauthorized action by individual States pending the intervention of the community on the authorization of a competent United Nations organ.

Secondly, this view is scarcely consistent with any analogy offered by private law; it has been shown that the concept of self-defence in private law presupposes an interest of a legal nature which the 'protector' has in the security of the actual victim. The right of intervention possessed by other persons is of an entirely different character, for it belongs to the realm of sanctions rather than to the concept of self-defence, individual or collective. Equally so in international law, the intervening State which has no 'legal' right in the security of the actual victim, which has not itself the right



of self-defence, must justify its action as being in the nature of a sanction; it is not self-defence, individual or collective.

Thirdly, this view distorts the concept of 'self-defence' out of all recognition; on such a view, 'collective self-defence' becomes assistance by one State, not itself possessing any right of self-defence, to another State which *may*<sup>1</sup> be exercising the right of self-defence. The range of individual State action permissible without the prior authorization of a competent organ of the United Nations becomes almost unlimited on this hypothesis. It cannot be a view consistent with the whole system of the Charter. The individual Members cannot, on the one hand, delegate primary responsibility for the maintenance of international peace and security to the Security Council (Article 24), and, on the other hand, claim this right of unilateral action to support any State which they consider to be acting in self-defence. This sort of freedom of alliance cannot stand together with a system of collective security as centralized as the United Nations Charter. The Charter clearly intends that the prohibition of Article 2 (4) will admit of only the minimum exception of self-defence, strictly construed, and subject to the overriding authority of the Security Council. The whole emphasis of the Charter is on collective action in the sense of action undertaken by the collectivity of States and authorized by the United Nations itself. It cannot be supposed that this extensive view of the scope of 'collective self-defence' would ever have been accepted at San Francisco;<sup>2</sup> admittedly it may be a more convenient view at the present time in view of the frustration of the Security Council by the lack of unanimity amongst the permanent members. In fact, one suspects that this extensive interpretation of the concept of 'collective self-defence' is due entirely to the political impasse within the Security Council which renders the effective operation of the machinery for collective action unlikely. However, the solutions to this problem are either the abandonment of the system of rights and duties contained in the Charter or the devising of substitute procedures for collective action *within* the United Nations. It is in fact the latter solution which has been adopted, as will presently be shown; for the moment let it suffice to say that the distortion of the concept of 'collective self-defence' is not a legitimate solution.

The requirements of the right of collective self-defence are, therefore, two in number; first, that each participating State has an individual right

<sup>1</sup> Only a subsequent, impartial, determination by an organ of the international community can really decide that it *is* exercising the right of self-defence. See the view of the International Military Tribunal, Judgment, 1 October 1946 (as printed in *American Journal of International Law*, 41 (1947), at p. 207).

<sup>2</sup> The French delegate in Committee III/4 suggested that the formula of Article 51 'extends in general to cases of mutual assistance against aggression' (U.N.C.I.O., Docs., vol. xii, p. 681), but no other delegate expressed this view and the Egyptian delegate expressly rejected it (*ibid.*, p. 682).

of self-defence, and, second, that there exists an agreement between the participating States to exercise their rights collectively. State practice had, prior to the Charter, shown how these requirements might be fulfilled. The principle that an attack upon one State may well involve so serious a threat to the security of another as to justify that other in regarding the attack as a violation of its own rights, of its own security, lay behind the Monroe Doctrine, the Pact of the Arab League,<sup>1</sup> and many bilateral security treaties.<sup>2</sup> Treaties existed evidencing the intention of States in such circumstances to exercise their rights of self-defence collectively, and the Declaration of Habana in July 1940<sup>3</sup> and the Act of Chapultepec of 3 March 1945<sup>4</sup> evidenced the agreement of the American States to change the Monroe Doctrine from a purely unilateral policy of the United States into a common policy based upon the right of collective self-defence.

The change wrought by the Charter lay not in the recognition of this pre-existing right but in the need, not apparent before, to distinguish this right from the freedom of States to take action, either individually or in concert, for the maintenance of international peace and security. This latter faculty, based not upon the necessity of defending the State's own rights but upon the desirability of action to redress violations of international law or attacks upon the rights of other States, is one which is more properly based upon a concept of collective security, and it bears no necessary relation to the right of collective self-defence. The distinction between the two is clearly brought out in the Charter; it is the distinction between Article 51 dealing with self-defence and Chapter VIII dealing with regional arrangements. Chapter VIII clearly demands that action by regional arrangements which has the character of 'enforcement action', namely, action to restore or maintain international peace and security, shall be undertaken only with the prior authorization of the Security Council. Action in collective self-defence under Article 51 requires no such prior authorization, whether undertaken by individual States or by groups of States, and whether or not the groups conform to the term 'regional arrangements'.

It is with this distinction in mind that the many treaty arrangements concluded either expressly or by necessary implication upon the basis of a right of collective self-defence have to be reviewed. The legality of the action contemplated by these treaties will depend, in the first instance, on whether it is contrary to the provisions of the Charter, of which Article

<sup>1</sup> Concluded on 22 March 1945. For text see *American Journal of International Law*, 39 (1945), Supp., p. 266.

<sup>2</sup> For example, the Franco-Soviet Treaty of Alliance of 10 December 1944. Text in *American Journal of International Law*, 39 (1945), Supp., p. 83.

<sup>3</sup> Second Meeting of Foreign Ministers of the American Republics, *Dept. of State Bulletin*, 24 August 1940, pp. 145-6.

<sup>4</sup> Text reproduced in *American Journal of International Law*, 39 (1945), Supp., p. 108.



2 (4) is the most relevant, and, in the second instance, on whether it is properly characterized as action in collective self-defence so as to fall within the exception of Article 51.

### *B. Treaty arrangements for collective self-defence*

It has already been indicated that the question of the legality of a use or threat of force by States under a claim of self-defence does not depend upon the degree of organization or treaty arrangement which has previously existed between the participating States. On the contrary, the criteria determining the question of legality or illegality are equally applicable to the complex, multilateral systems like the North Atlantic Treaty Organization, and to the simple, bilateral agreements (and even to joint action without prior treaty agreement).

In many cases treaties for collective self-defence claim expressly to be based upon Article 51 of the Charter of the United Nations; Article 5 of the North Atlantic Treaty speaks of action which parties will take 'in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations . . .'; and there are similar provisions in other treaties.<sup>1</sup> To the extent that these treaties re-state rights and obligations already existing under the Charter of the United Nations,<sup>2</sup> they are, for Members of the United Nations, primarily declaratory, and no question of inconsistency can arise. Indeed, many of the treaties attempt to avoid inconsistency by expressly asserting the paramountcy of the obligations under the Charter,<sup>3</sup> and Article 103 of the Charter itself states the same principle.

In most of the treaties there is an obligation on Members to consult together in certain circumstances; Article 4 of the North Atlantic Treaty may be taken as a typical example:

'The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.'<sup>4</sup>

<sup>1</sup> For example, Article 3 of the Rio Treaty, Article 4 of the Brussels Treaty (Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed at Brussels, 17 March 1948: printed in *American Journal of International Law*, 43 (1949), Supp., p. 59). For a general survey of these treaties see Bebr, 'Regional Organisations: a United Nations Problem', *ibid.*, 49 (1955), p. 166, at p. 175.

<sup>2</sup> Such as the obligation 'to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations' found in Article 1 of the North Atlantic Treaty; Article 1 of the Rio Treaty; Article 1 of the Manila Treaty (S.E.A.T.O.) signed at Manila, 8 September 1954 (text cited in the *Manchester Guardian*, 10 September 1954).

<sup>3</sup> For example, Article 6 of the Manila Treaty; Article 10 of the Rio Treaty; Article 5 of the Brussels Treaty; Article 7 of the North Atlantic Treaty.

<sup>4</sup> See also Article 7, Brussels Treaty; Article 4 (2), Manila Treaty; Articles 6 and 7, Rio Treaty; Article 4, Soviet-Roumanian Treaty (4 February 1948) (*U.N. Treaty Series*, vol. 48, p. 189); Article 4, Soviet-Chinese Treaty (14 February 1950) (*American Journal of International Law*, 44 (1950), Supp., p. 84); Article II of the U.S.A.-Korean Treaty (1 October 1953) (*ibid.*, 48 (1954), Supp., p. 147); Article III of the Tripartite Security Treaty between Australia, New Zealand,



Consultation as such cannot involve the parties in any breach of their obligations; since the primary and most fundamental limitation on the freedom of the parties to take collective action is contained in Article 2 (4) of the Charter, the question of inconsistency with the Charter really only arises when they contemplate action involving the 'threat or use of force'. Action of this nature must find conformity with Article 2 (4) (which, it will be noted, brings in the general question of consistency with the Purposes of the United Nations), and Article 51; the latter article imposes certain positive obligations on Members in respect of their right of individual or collective self-defence. When action *prima facie* within the terms of the prohibition of Article 2 (4) is contemplated under these treaties, certain questions arise: they are (i) whether the circumstances in which such action is contemplated, i.e. the *casus foederis*, correspond with the circumstances in which that action is permitted by the Charter; (ii) whether the provisions of the Treaty in regard to the execution of such action involve any inconsistency with obligations under the Charter; and (iii) whether the action contemplated under the Treaty is correctly characterized as action in self-defence, individual or collective.

(i) *The casus foederis—is it defined consistently with the Charter?*

As to the first question, the *casus foederis* is variously defined in collective security treaties.<sup>1</sup> In the North Atlantic Treaty, Article 5 provides:

'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence, recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

Here it is by the use of the phrase 'armed attack' that it is sought to express the *casus foederis* in terms consistent with Article 51 of the Charter. Similarly, Article 4 of the Manila Treaty refers to 'aggression by means of armed attack in the treaty area',<sup>2</sup> Article IV of the Anzus Pact refers to

and U.S.A. (1 September 1951)—the so-called Anzus Pact (see Royal Institute of International Affairs, *Documents on International Affairs*, 1951, p. 677).

<sup>1</sup> For an exhaustive compilation of terms used, both in treaties antedating the Charter and afterwards, see the Secretary-General's Report on the Question of Defining Aggression (A/2211), 3 October 1952.

<sup>2</sup> There is appended to the text an 'Understanding of the United States of America' in these terms: 'The delegation of the United States of America in signing the present treaty does so with the understanding that its recognition of the effect of aggression and armed attack and its agreement with reference thereto in Art. 4, para. one, apply only to Communist aggression, but affirms that in the event of other aggression or armed attack it will consult under the provisions of Art. 4.'

'armed attack in the Pacific Area', and Article VI of the Arab League Pact appears to equate a 'case of aggression or threat of aggression' with an 'attack'. The general tenor of these treaties suggests that it was intended to link them to the terms of Article 51 of the Charter.

This is not the case, however, with the system of bilateral treaties which originally constituted the Soviet system of collective security.<sup>1</sup> In these treaties the *casus foederis* is defined more in terms of 'military aggression', 'aggression', and 'aggressive policy' than in terms of an armed attack. Moreover, so far as the treaties with States in eastern Europe are concerned, they aim at security against renewed aggression by Germany or any State allying itself with Germany. The Soviet-Finnish Treaty of 6 April 1948 is fairly typical: Article 1 (1) states:

'In the event of Finland or the Soviet Union, across the territory of Finland, becoming the object of military aggression on the part of Germany or any state allied to the latter, Finland, loyal to her duty as an independent state, will fight to repulse the aggression. In doing so, Finland will direct all the forces at her disposal to the defence of the inviolability of her territory on land, on sea, and in the air. . . .'<sup>2</sup>

The Treaty of Friendship, Alliance, and Mutual Assistance between the U.S.S.R. and China is, not unnaturally, directed at Japan rather than Germany and is somewhat more widely phrased: Article 1 states that the agreement is

' . . . to take all the necessary measures at their disposal for the purpose of preventing a repetition of aggression and violation of peace on the part of Japan, or any other state which should unite with Japan, directly or indirectly, in acts of aggression. . . .'<sup>3</sup>

This type of phrasing, particularly when it refers to States which ally themselves with either German or Japanese aggression 'directly or indirectly' or 'directly or in some other form',<sup>4</sup> is much wider than the phrase 'armed attack', and it is on this ground that the Soviet collective security

<sup>1</sup> See generally Kulski, 'The Soviet System of Collective Security Compared with the Western System', in *American Journal of International Law*, 44 (1950), p. 453; also Bebr, loc. cit., p. 182.

<sup>2</sup> *United Nations Treaty Series*, vol. 48, p. 149. The Brussels Treaty originally, in its Preamble, resolved 'to take such steps as may be held to be necessary in the event of a renewal by Germany of a policy of aggression'. But see Annex I to the Final Act of the London Conference, 3 October 1954, deleting the phrase and substituting 'to promote the unity and to encourage the progressive integration of Europe': *N.A.T.O.*, 1949-54, by Lord Ismay, p. 243. The Dunkirk Treaty between the United Kingdom and France, 4 March 1947 (*U.K. Treaty Series*, (67) 1946, Command Paper 7015) also deals explicitly with the renewal of German aggression.

<sup>3</sup> Signed at Moscow on 14 February 1950 (text in *American Journal of International Law*, 44 (1950), Supp., p. 84).

<sup>4</sup> Article 2 of the Polish-Bulgarian Treaty, 29 May 1948 (*U.N. Treaty Series*, vol. 26, p. 213). And see Article 2 of the Soviet-Yugoslav Treaty, 11 April 1945: 'If one of the contracting parties should in the post-war period be drawn into military operations against Germany, which would have resumed her aggressive policy, or against any other State which would have joined Germany either directly or in some other form in a war of this nature, the other contracting party . . . etc.' This Treaty was denounced by the U.S.S.R. on 28 September 1949: see Royal Institute of International Affairs, *Documents*, 1949-50, p. 473. See also, for similar clauses, the treaties between U.S.S.R. and Hungary, 18 February 1948 (*United Nations Treaty Series*, vol. 48, p. 163);



system has been criticized as not being in conformity with Article 51.<sup>1</sup> It would appear, from the use of terms like 'aggression' to define the *casus foederis*, that the legal basis of these treaties is allegedly Article 107 and not Article 51. This view, though never made explicit in the treaties, is supported by the fact that they all hinge upon aggression by an 'enemy' State within the terms of Article 107. However, in so far as the treaties contemplate action against States other than Germany or Japan they clearly cannot be brought within the terms of Article 107; action of this extended nature will have to be justified under Article 51. Recently, a marked change in the legal policy behind the Soviet security system has become evident in the Warsaw Pact of 14 May 1955.<sup>2</sup> This Treaty is analogous to the Western multilateral treaties and sets up an organization to handle the procedures of consultation and of organizing a unified military command. The Warsaw Treaty Organization is clearly based on Article 51 of the Charter. Article 4 of the Treaty states:

'En cas d'attaque armée en Europe contre un ou plusieurs Etats signataires du Traité par un Etat quelconque ou un groupe d'Etats, chaque Etat signataire du Traité, en exercice du droit de légitime défense individuelle ou collective, conformément à l'article 51 de la Charte des Nations Unies, prêterà à l'Etat ou aux Etats victimes d'une telle attaque une aide immédiate, individuellement et en accord avec les autres Etats signataires du Traité, par tous les moyens qui lui sembleront nécessaires, y compris l'emploi de la force armée. . . .'

As has previously been indicated, however, the right of self-defence is not limited to cases of an 'armed attack', so that the mere fact that the *casus foederis* in the bilateral treaties of the Soviet system is not limited to cases of an actual 'armed attack', is not conclusive on the question of compatibility with the Charter. The real question, to which none of these treaties either of the Soviet or Western systems gives a definite answer, is whether they contemplate the exercise of the remedial right of self-defence only in cases where those substantive rights to which the remedial right of self-defence attaches are violated. What precise form the violation takes, whether it is an 'armed attack', 'aggression', or 'threat of aggression', is only relevant on the question of proof of violation. It cannot be assumed from these treaties that it is only an 'armed attack' or 'aggression' against the rights of political independence or territorial integrity which will bring into operation the obligation on members to afford assistance<sup>3</sup> including the use

U.S.S.R. and Poland, 21 April 1945 (*ibid.*, vol. 12, p. 391); U.S.S.R. and Czechoslovakia, 12 December 1943 (*American Journal of International Law*, 39 (1945), Supp., p. 81).

<sup>1</sup> Kulski, *op. cit.*, pp. 460-1.

<sup>2</sup> Text given in *Zbiór Dokumentów*, No. 5, Warsaw (1955). Extracts from Marshal Bulganin's speech at the opening of the Warsaw Conference on 11 May 1955 are given in Royal Institute of International Affairs, *Calendar and Texts*, May 1955, vol. 2, No. 5, at p. 138; these explain the Soviet views on the need for the new organization and explain its operation.

<sup>3</sup> And it makes no essential difference whether the obligation is to take immediate action to



of force. In the absence of any definition in these treaties of the substantive rights which must be violated before 'aggression' or an 'armed attack' can properly be said to have occurred, it is open to the members to treat any violation of any substantive right as 'aggression', and any use of force as an 'armed attack'. For example, a State's economic policy might be deemed to be 'economic aggression'—the term is not unknown—or an exchange of fire between frontier posts an 'armed attack'; there is nothing in these treaties to prevent such constructions of the *casus foederis*. Yet it cannot seriously be suggested that either of these examples would justify the use of force by a number of States bound together by a treaty for collective self-defence. It is true that in the North Atlantic Treaty (Article 4), the Manila Treaty (Article 4 (2)), and the Rio Treaty (Article 6), the obligation to consult arises whenever there is a threat to the territorial integrity or political independence of any member. This does not, however, restrict the construction of those provisions on which the obligation to afford armed assistance depends, for they contain no enumeration of the substantive rights which must be violated before an 'armed attack' or 'aggression' occur.

The Rio Treaty is the most elaborate, and merits detailed treatment. In distinguishing 'armed attack' from other aggressions, and aggression within the Americas from those without, as well as differentiating between aggressors which are American from those which are not, the Treaty envisages five different situations.

- (1) An armed attack *within* the region defined in the Treaty by either an American or a non-American State. (Article 3 (3).)<sup>1</sup>
- (2) An armed attack *outside* the Treaty region but within the territory of an American State. (Article 3 (3).)<sup>2</sup>
- (3) An armed attack *outside* the Treaty region and outside the territory of an American State. (Article 3 (3) and (6).)<sup>3</sup>
- (4) Aggression not taking the form of an armed attack, whether inside or outside the Treaty region. (Article 6.)

assist the victim of the armed attack or aggression, as in the Soviet treaties or the Rio Treaty and the North Atlantic Treaty, or whether the obligation is dependent on a decision of some organ set up by the Treaty, as in the Pact of the Arab League. The legal character of the action when taken is the same; there is, in the latter case, perhaps more assurance that assistance will be justified by reference to the conditions governing the right of individual or collective self-defence, but so long as the organ is not the Security Council or General Assembly, its decision does not affect the nature of the action.

<sup>1</sup> For an example of this situation see the Costa Rican complaint against Nicaragua in a Note of 11 December 1948 to the Chairman of the Council of the Organisation of American States, discussed in *American Journal of International Law*, 43 (1949), p. 329, by C. G. Fenwick. See also Bebr, loc. cit., pp. 176-7. An account of the proceedings of the Council of the Organisation of American States is given in the *Manchester Guardian* of 18 January 1955.

<sup>2</sup> I.e. Hawaii.

<sup>3</sup> I.e. Canada or Greenland.

- (5) Threats of aggression, extra-continental or intra-continental conflicts, or any other fact or situation which might endanger the peace of America. (Article 6.)

In situations (1) and (2) the action is 'considered as an attack against all the American states and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence, recognised by Art. 51 of the Charter of the United Nations'.<sup>1</sup> In the third situation the action also constitutes an attack on all American States but, as distinct from the first two situations, no duty to afford immediate assistance to the victim State, on its request, arises. There is, however, a duty to consult, and 'the Organ of Consultation shall meet immediately in order to agree on the measures which *must* be taken in case of aggression to assist the victim of aggression or, in any case, the measures which should be taken for the common defence and for the maintenance of the peace and security of the Continent'.<sup>2</sup> In the fourth situation the action merely gives rise to the obligation to consult, but, as in the third situation, the Organ of Consultation must meet and take the measures indicated in Article 6. In the fifth situation there is the same obligation to consult but the taking of measures by this Organ of Consultation appears to be optional, due to the use of the word 'should' rather than 'must'.<sup>3</sup>

In Article 9, the Treaty gives a non-exhaustive definition of aggression which still leaves a discretion in the Organ of Consultation to characterize other acts as aggression.

'In addition to other acts which the Organ of Consultation may characterize as aggression, the following shall be considered as such:

- '(a) Unprovoked<sup>4</sup> armed attack by a State against the territory, the people or the land, sea or air forces of another State.
- '(b) Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty,

<sup>1</sup> Article 3 (1). Individual assistance can only be given at the request of the actual victim (Article 3 (2)). (But the request of any Member State will summon the Organ of Consultation.) This obligation of automatic assistance is qualified by Article 20, which provides that no State shall be required to use armed force without its consent. Fenwick, loc. cit., p. 313, regards this as a merely technical limitation on the obligation of Article 3 'introduced so as to avoid the appearance of submitting to the decision of a two-thirds majority the constitutional right of the U.S. Congress to declare war'. When the attack is by another American State a special procedure applies. The Organ of Consultation may call upon both parties to suspend hostilities and restore the *status quo ante bellum*. The rejection of pacifying action will be considered in the determination of the aggressor (Article 7).

<sup>2</sup> Article 6.

<sup>3</sup> Kunz, 'The Inter-American Treaty of Reciprocal Assistance', in *American Journal of International Law*, 42 (1948), p. 117.

<sup>4</sup> The notion of 'provocation' may be subject to different meanings: see the Secretary-General's Report on the Question of Defining Aggression (U.N. Doc. A/2211), 3 October 1952, at p. 49. See also the strictures of M. Alfaro in the International Law Commission (A/CN.4/L.8, pp. 10-11), where he regarded Article 9 as 'introducing the vague, imprecise and uncertain element of provocation'.



juridical decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State.'

Since, however, the definition is not exhaustive, it remains possible for the Organ of Consultation to decide upon the measures enumerated in Article 8, and including the 'use of armed force', to be taken 'if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected [the word is weaker than threatened or violated<sup>1</sup>] by an aggression which is not an armed attack . . .' or if the peace of America is endangered 'by an extra-continental or intra-continental conflict, or by any other fact or situation'.<sup>2</sup> These causes, which may prompt the Organ of Consultation into taking a decision to use armed force, are by no means limited to an 'armed attack', nor do they bear any necessary relation to the breach of those substantive rights which, in our view, can alone justify the exercise of a right of self-defence. Admittedly the latter part of Article 6 suggests a link with some notion of self-defence in referring to 'measures . . . to assist the victim of aggression . . . for the common defence and for the maintenance of the peace and security of the Continent'. Yet the link is vague and imprecise, and the phrasing has the sound of a political document or manifesto rather than a definition of legal rights.

There is in all these treaties overmuch concern with the *casus foederis* and its definition, and too little concern with the content of the rights which, if the treaties really are based upon the right of self-defence, they purport to protect. They run the danger of any definition which is formal and bears no stated relationship to the substantive rights involved. The rights of 'territorial integrity, political independence, or security' are referred to in Article 4 of the North Atlantic Treaty, but the reference relates to the obligation to consult, not the obligation to render assistance involving armed force; also, in Article 9 of the Rio Treaty the reference to a right of territorial integrity is made by implication when the Treaty deals with the forms of hostile action which the Organ of Consultation may characterize as aggression. It is fairly clear that none of these treaties, of either the Soviet or the Western systems, really attempts a definite statement of the rights which they claim to protect by the series of mutual obligations contained in the treaties. It may be, of course, that in stating that the parties to the Treaty will take action 'in the exercise of the inherent right of individual or collective self-defence recognised by Art. 51 of the Charter of the United Nations',<sup>3</sup> or by the use of terms like 'armed attack' or 'aggression', it is necessarily implied that the obligations under the Treaty are all to

<sup>1</sup> Bracketed words added.

<sup>2</sup> Article 6 of the Rio Treaty.

<sup>3</sup> Article 3 (1) of the North Atlantic Treaty.

be read subject to the limitations and conditions imposed upon the exercise of the right of self-defence by general international law and the Charter. To this extent the treaties would merely provide additional obligations not inconsistent with the general law, or else provide a degree of organization for the exercise of rights sanctioned by the general law. The danger lies, however, in the possibility of States acting on the literal interpretation of these treaties, without reference to the limitations and conditions imposed upon this exercise of the right of self-defence by the general law. For example, it is not every 'armed attack' which can be automatically characterized as illegal; we have previously indicated that a State may, in the exercise of the right of self-defence, take 'anticipatory' action against an imminent threat to its security which leaves no other course of action open to the State apart from completely jeopardizing its existence. Situations such as that occurring when a State is faced with large-scale mobilization by an avowedly belligerent neighbour on its frontiers, or that envisaged by the United Nations Atomic Energy Commission<sup>1</sup> as resulting from a serious breach of a treaty prohibiting the manufacture of nuclear weapons, are examples of the kind of situations which would appear to justify anticipatory action involving armed force and, possibly, a transgression of the territory of the threatening State. Action of this nature would, *prima facie*, fall within the definition of an armed attack adopted by the North Atlantic Treaty or the Rio Treaty,<sup>2</sup> for example; the literal application of the treaty provisions, without regard for the general law, would involve the parties in action against a State itself acting in self-defence. Moreover, the literal application of these treaties would treat isolated attacks upon the ships or aircraft of one of the members as a *casus foederis*,<sup>3</sup> and set into motion the whole series of obligations of assistance, again without regard to the cause of such attacks or to the requirement of proportionality which is an essential condition of the exercise of the right of self-defence under the general law.

The conclusion seems inescapable that, to avoid a conflict with the conditions imposed on the exercise of the right of self-defence by general international law, the parties to these treaties (both Soviet and Western) must retain a measure of discretion to apply their terms only within the limits allowed by general international law. The individual State may in some cases

<sup>1</sup> U.N. Doc. AEC/18/Rev. 1, p. 24.

<sup>2</sup> At least in so far as the obligation of immediate assistance arises under Article 3. The definition of aggression under Article 9 refers to 'Unprovoked armed attack' and, for the purposes of a decision of the Organ of Consultation, avoids this difficulty.

<sup>3</sup> This results from the definition of an 'armed attack' in Article 6 of the North Atlantic Treaty (as amended), Article 9 of the Rio Treaty. It must probably be assumed that the attacks are 'acts of State' and not unauthorized acts of individual members of the armed forces. This seems to be implied from the phrase 'armed attacks by any State' in Article 3 of the Rio Treaty; the North Atlantic Treaty does not use the phrase 'by any State', but presumably this would be the normal interpretation.



find a warrant for exercising such discretion in the actual language of the clause which describes the manner in which the obligation of immediate assistance is to be performed. For example, Article 5 of the North Atlantic Treaty contains the phrase 'by taking forthwith . . . such action as it deems necessary',<sup>1</sup> though, strictly speaking, the discretion may have been intended to relate rather to the enforcement action than to the appreciation of the legal merits of the *casus foederis*. Where the decision to use armed force rests with an organ set up by the Treaty, the States collectively, acting through this organ, may exercise a similar discretion, although Article 9 of the Rio Treaty provides that the Organ of Consultation 'shall' consider the acts enumerated there as aggression, and to this extent appears to curtail the discretion of the Organ. Unless, however, discretion is exercised by the parties to these treaties, acting individually or collectively through an organ, the automatic and literal application of their provisions will not necessarily be limited to the exercise of the right of self-defence, whether individual or collective, sanctioned by general international law.

- (ii) *Is there any inconsistency between the provisions of these treaties and the special obligations under the Charter relating to the exercise of collective self-defence?*

It is now necessary to turn to the second question, namely, whether the provisions of the Treaty in regard to the execution of action in professed reliance on the right of individual or collective self-defence involve any inconsistency with obligations under the Charter. This question concerns the special obligations which are imposed on Members of the United Nations by Article 51 of the Charter when they take action in purported reliance on the right of self-defence. These are the obligations to report immediately to the Security Council measures taken in the exercise of the right, and also the obligation to cease action in self-defence when the Security Council 'has taken the measures necessary to maintain international peace and security'. Certain of the treaties faithfully repeat these obligations in express terms. Thus Article 5 of the North Atlantic Treaty states:

'Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.'<sup>2</sup>

Article 4 of the Warsaw Pact also contains a restatement of these obligations, but the bilateral security treaties concluded by the U.S.S.R. do not contain

<sup>1</sup> Fenwick, *loc. cit.*, p. 314, regards this formula as due to the constitutional problems of the United States of America touching the Presidential power to commit forces and the congressional right to declare war. Almost identical phrasing is found in Article 4 of the Warsaw Treaty.

<sup>2</sup> See also Article 4 of the Manila Treaty; Article 5 of the Brussels Treaty; and Articles 3 and 5 of the Rio Treaty.

similar provisions, and it has been suggested that these treaties are to that extent illegal.<sup>1</sup> There is, in our submission, no basis for this view; the obligations to report measures undertaken, and to cease such measures once the Security Council has taken the measures necessary to restore and maintain international peace and security, arise from the Charter, and a restatement of them is unnecessary. It would, of course, be illegal to stipulate in these treaties conduct inconsistent with these obligations, but the mere omission to restate the duties imposed by the Charter is not in itself illegal.

(iii) *Is the action contemplated under these treaties correctly characterized as individual or collective self-defence?*

The third, and perhaps most substantial, question is whether the action contemplated under these treaties, whether of the simple bilateral type or of the more complex form, is correctly characterized as action in self-defence, individual or collective. It has been suggested above that the right of self-defence is available only to a State which defends its own substantive rights, and that the difference between the individual and the collective right lies in whether States exercise their right of self-defence individually or in concert. The question then arises whether the action contemplated by these treaties will necessarily be of a kind to qualify as defensive action of that character.

These treaties are based upon the principle that an attack against any one party is an attack against the other party or parties to the treaty; the principle involved is the same whether the operative phrase, the *casus foederis*, is 'armed attack', 'aggression', or 'aggressive policy'. As an abstract statement this must be a fiction; in the concrete situations envisaged by these treaties it may, however, be a statement of actual fact. It is not difficult to envisage a direct attack against a State in western Europe which, in view of the magnitude of the attack and the evidence of a wider aggressive intention which it affords, in fact threatens the security of all the States in the northern part of the Western Hemisphere. The interdependence of the securities of a number of States may, in this age, be stated without real fear of contradiction; it would result in an attack against one constituting in fact, and not merely as a fiction, a violation of the right to independence and security of other States. On the other hand, it would be ludicrous to suppose that by the mere conclusion of a treaty any two States could bring mutual assistance within the concept of self-defence as this concept is

<sup>1</sup> See Kulski, *op. cit.*, p. 462. The Manila Treaty also contains no restatement of these obligations. See also the Balkan Pact of August 1954 between Greece, Turkey, and Yugoslavia (text reproduced in *American Journal of International Law*, 48 (1954), Supp., p. 47). This Pact makes the termination of the parties' defensive measures dependent on the Security Council's 'effectively applied measures mentioned in Article 51' (Art. 7 (1)).



known in international law. To state, for example, that an attack upon Chile, say by one of its South American neighbours, is an attack upon the United Kingdom or Turkey would be a possible statement, but it would belong to the realm of fiction rather than fact. Consequently, should either the United Kingdom or Turkey afford military assistance to Chile in those circumstances, their action could only by a travesty of terminology be called collective self-defence. It is not believed that the juridical concept of a right of self-defence can be stretched to an extent which is so far removed from fact by using this fiction of 'an attack against one is an attack against all'.

It is for this reason, it is believed, that these treaties are concluded between States in some geographical proximity to each other; many of them are restricted in their application to defined regions. Whether it be the 'North Atlantic Area' defined in Article 6 of the North Atlantic Treaty,<sup>1</sup> the European area of the Brussels Treaty,<sup>2</sup> or the Warsaw Treaty, the region defined in Article 4 of the Rio Treaty, or the 'Pacific area' defined in Article 8 of the Manila Treaty,<sup>3</sup> the regional nature of these treaties suggests an interdependence in fact of the security of the member States. It comes close to the 'proximate relationship' of kinship which in private law justifies assistance by one person to another within the concept of self-defence. Within the defined area the statement that an attack against one State is an attack against all must be taken to be a statement of the belief of the parties that the security of each is so dependent on the security of every other party that a violation of the rights of one party would in fact also constitute a violation of the rights of all other parties. The treaties therefore establish a means by which these States, each having the right of individual self-defence, may exercise their rights collectively. It is significant that in the Declaration by the Governments of the United

<sup>1</sup> For the current definition of the region, amending Article 6 on the accession of Greece and Turkey, see Article II of the Protocol to the North Atlantic Treaty, London, 17 October 1951. Text given in *Western Co-operation*, Central Office of Information, London, September 1953, p. 71.

'For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack

- (i) on the territory of any of the Parties in Europe or N. America, on the Algerian Departments of France, on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer.
- (ii) on the forces, vessels or aircraft of any of the Parties when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.'

<sup>2</sup> Article 4, now Article 5 of the revised Treaty. See Annex 1 to the Final Act of the London Conference (text in *N.A.T.O.*, 1949-54, by Lord Ismay, p. 242).

<sup>3</sup> Article 4 (1) of the Manila Treaty refers to 'armed attack in the treaty area against any of the parties or against any State or territory which the parties by unanimous agreement may hereafter designate would endanger its own peace and safety . . .'. A Protocol has designated the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam as being within these terms.

States, the United Kingdom, and France, recorded at the London Conference in October 1954, these Governments stated that:

'They will regard as a threat *to their own peace and safety* any recourse to force which in violation of the principles of the United Nations Charter threatens the integrity and unity of the Atlantic Alliance or its defensive purposes.'<sup>1</sup>

In these circumstances, therefore, they considered that Article 4 of the North Atlantic Treaty would be applicable. This Declaration, with its insistence on a threat 'to their own peace and safety', implies that each one of the three States would deem itself to be in a state of individual self-defence—and the North Atlantic Treaty would provide the means of exercising these individual rights collectively. Similarly, Article IV of the Anzus Pact provides:

'Each Party recognises that an "armed attack" in the Pacific Area on any of the Parties would be dangerous *to its own peace and security*.'<sup>2</sup>

Yet, even with the restriction implicit in the limiting of membership to States within a defined region, it is not necessarily true that every armed attack would, even within the region, in fact constitute an attack on each party so as to allow to each party the right of self-defence; and yet without this individual right they can scarcely claim to participate in a collective exercise of the right of self-defence. It is possible to imagine an armed invasion of Greece, for example, arising out of difficulties on her northern frontiers and taking the form of a limited invasion into Greek territory by forces of a neighbouring State (that State alleging the action to be by way of reprisals) which, though technically within the terms of Article 4 of the North Atlantic Treaty, could not possibly be said to constitute in fact an armed attack on every N.A.T.O. member. In such a case intervention by States like the United States of America, Canada, or Norway could not really be justified on the basis of the right of self-defence, individual or collective, if that right is to retain a juridical connotation and not dissolve into a description of political affiliations.

It is not suggested that it is only geographical proximity which can constitute the interdependence between States which is essential before an attack upon one is also in effect an attack upon the other. Though the *nexus* is normally of a geographical kind, it is not permissible to assume that only this kind of link is sufficient to afford an adequate basis for the exercise of the right of collective self-defence.<sup>3</sup> The 'proximate relationship'

<sup>1</sup> *N.A.T.O.*, by Lord Ismay, p. 242. Cf. also the United States President's decision to defend Formosa and the Pescadores as being within the American 'defensive perimeter'; the basis for this view seems to be that invasion of these islands by hostile forces would involve a threat to the security of the Philippines and ultimately to the United States of America itself. See Report of Congress Proceedings in the *Manchester Guardian*, 26 January 1955. The full text of the Presidential message is given in the same newspaper of the previous day.

<sup>2</sup> See also Article 4 (1) of the Manila Treaty.

<sup>3</sup> See Nguyen Quoc Dinh, 'La Légitime Défense d'après la Charte des Nations Unies', in



between States having a right of collective self-defence can be constituted by a link which is political rather than geographical; for example, it is perfectly proper to treat an attack against any one member of the British Commonwealth on any considerable scale as an attack upon the Commonwealth as a whole. There may also be ties of a strategic or economic nature which make the security of one State dependent upon the security of another. It will be recalled that on the occasion of its signing the Paris Pact of 1928, the British Government in a Note of 19 May 1928 stated:

'There are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. . . . Their protection against attack is to the British Empire a measure of self-defence.'<sup>1</sup>

This, in essence, was the basis of the Monroe Doctrine, although that doctrine was fortified by the existence of a certain geographical proximity. In theory the complete interdependence of two States in the economic field could equally well make their security as one. The forms of interdependence are perhaps not so significant as the question, always one of fact, whether the violation of the legal rights of one State constitutes a threat to the security of the other State. This, in final analysis, is the only essential question, and factors such as geographical proximity, political ties, complementary economies, &c., only relate to the proof of interdependence.

Each member of the collective security arrangement would, therefore, in such cases, have to decide whether in the light of the conditions imposed on the exercise of the right of self-defence by general international law the State had the right of self-defence to exercise according to the treaty arrangements for the collective exercise of such a right. Reliance on the Treaty is not enough, for the obligations contained in the Treaty are subject to the overriding obligations contained in the Charter, and Article 2 (4) is categorical. Unless the States using force or the threat of force in pursuance of their obligations under a collective security treaty can show that their action was authorized by a competent organ of the United Nations, they must show that their action is justified as being in the exercise of the right

*Revue générale de droit international public*, 52 (1948), p. 223, at p. 245, who concludes that 'la légitime défense collective devrait, à notre avis, s'appeler légitime défense régionale'; this has, admittedly, some basis in the discussion in Committee III/4 at San Francisco, but nothing in that discussion excludes a wider view. Wehberg had, in 1931, criticized the so-called 'British Monroe Doctrine' and distinguished it from the Monroe Doctrine proper by its lack of precision and limitation to a definite geographical region (*Outlawry of War* (1931), p. 86).

<sup>1</sup> Royal Institute of International Affairs, *Documents*, 1928, p. 5. The British claims seem to relate to India, Afghanistan, Persia, and Egypt; see Pearce-Higgins, 'The Monroe Doctrine', in this *Year Book*, 5 (1924), p. 114. Wehberg (op. cit., p. 86) describes the claim as 'a very dubious reservation, of a purely imperialistic nature'. Miller, *The Peace Pact of Paris*, pp. 117-18, regards it as a permissible reservation to the Paris Pact. For further claims by the Japanese Government relating to Chinese territory, see the statement of Mr. Eijii Amau in April 1934, cited in Hyde, 'Legal Aspects of Japanese Pronouncements in Relation to China', in *American Journal of International Law*, 28 (1934), p. 431.

of individual or collective self-defence,<sup>1</sup> and this right is governed by general international law, not by these collective security treaties, whether bilateral or multilateral. Moreover, the requirement of proportionality would exclude a general right of intervention by all parties to the Treaty. The view put forward in the De Brouckère Report in 1926, that not every act of violence justifies its victim in resorting to self-defence, in our submission, is still sound,<sup>2</sup> for 'legitimate defence implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger'. This applies with equal force to third States claiming the right to intervene by virtue of the concept of 'collective self-defence'.

The only other possible view as to the nature of the action contemplated under these treaties is that, where the conditions governing the exercise of the right of self-defence are not satisfied, participation in collective action by members not satisfying those conditions is still justified as action taken for the purpose of maintaining international peace and security within a particular region. This is not the avowed nature of the action; the Western treaties and the Warsaw Treaty at least avowedly claim their juridical basis in the right of self-defence, but as a purpose of the organization it is sometimes stated that the organization will take 'such action as it deems necessary, including the use of armed force, to restore or maintain the security of the North Atlantic area',<sup>3</sup> or whatever the appropriate area is. Article 5 of the Rio Treaty suggests this alternative basis for action taken by providing for the reporting of action taken or in contemplation to the Security Council 'in the exercise of the right of self-defence or for the purpose of maintaining inter-American peace and security'. However, it is possible that the latter alternative refers to the action which the Organisation of American States would take as a regional arrangement pursuant to an authorization of the Security Council; the North Atlantic Treaty does not expressly contemplate the Organisation being used as a regional arrangement,<sup>4</sup> although there is nothing to prevent its members taking action to maintain or restore international peace and security pursuant to a request of the Security Council. To the extent that the automatic or literal applica-

<sup>1</sup> Assuming the action is not directed against an 'enemy' State under Article 107 or Article 53 (1).

<sup>2</sup> Report of 1 December 1926. See League of Nations Doc. A.14. 1927. V, p. 60.

<sup>3</sup> Article 5 of the North Atlantic Treaty. See also the Preamble to the Brussels Treaty: 'To afford assistance to each other, in accordance with the Charter of the United Nations, in maintaining international peace and security and in resisting any policy of aggression.' And see the Warsaw Treaty which refers to consultation 'dans l'intérêt de l'organisation de la défense commune et du maintien de la paix et de la sécurité' (Article 3) and measures necessary 'de rétablir et de maintenir la paix et la sécurité internationales' (Article 4).

<sup>4</sup> The principal exposition of this view is by Beckett, *The North Atlantic Treaty*, &c. (1950); for the counter-argument see Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?', in *American Journal of International Law*, 45 (1951), at p. 162.



tion of these treaties could warrant action not strictly within the concept of self-defence, at least for some of the members of the organization, this other basis would seem to be the only one available. The action taken would be in the nature of collective security action rather than action in collective self-defence. It would be, within the region, a substitute for the kind of collective security which, under the Charter, the Security Council was designed to take. The phrase 'to restore or maintain the security of the North Atlantic area' is, literally, a regional definition of the functions relating to the maintenance of international peace and security for which, on a global basis, the Security Council has been given primary responsibility. The Warsaw Treaty, in Article 4, is even wider in phrasing, for it refers to 'les mesures communes qu'il sera nécessaire d'entreprendre afin de rétablir et de maintenir la paix et la sécurité internationales' without any limitation as to region. These phrases bear close analogy to the phrasing used with reference to the powers of the Security Council in Articles 24, 39, 42, and 43 of the Charter. To regard the action of these treaty organizations as a regional substitute for the action which, under the Charter, it was contemplated that the Security Council would take is consistent with the fact that in the main they developed after 1946 and after the Security Council had begun to demonstrate the lack of real unanimity amongst the permanent members and, as a result, the unlikelihood of its fulfilling this function. It is also consistent with the attitude of the United Kingdom, France, and the United States of America in relation to the situation in the Middle East; the Tripartite Declaration of 25 May 1950<sup>1</sup> states that these Powers have

'deep interest in . . . the establishment and maintenance of international peace and security in the area . . . [and] should they find that any of these States [the Middle East States<sup>2</sup>] was preparing to violate frontiers or armistice lines, would, consistently with their obligations as Members of the United Nations, *immediately* take action, both *within and outside* the United Nations, to prevent such violation'.

Kunz, writing of the North Atlantic Treaty Organization, says:

'But the Treaty certainly had in view the fact that the Security Council is paralysed by the veto; here as in the United Nations as a whole Art. 51 is being used more and more as a substitute, as Ersatz for the non-existing general collective security and sanctions. But self-defence under Art. 51 gains, under such conditions, a very different meaning and becomes a technique pretty near to the old-fashioned right to resort to war, especially as there is no juridical control over the exercise of self-defence.'<sup>3</sup>

<sup>1</sup> *The Times* newspaper, 26 May 1950. See also the debate in the House of Commons on 13 February 1950 in which the Prime Minister seems to suggest that 'action' involves the use of force; reported in the *Manchester Guardian*, 14 February 1956; but see the report in the *Manchester Guardian*, 15 February 1956, of the statement by a Foreign Office spokesman that forces would not be used without the consent of the countries to which they would be sent.

<sup>2</sup> Bracketed words added.

<sup>3</sup> *Op. cit.*, p. 120. And see Fenwick, *loc. cit.*, p. 315; also Surrey, 'The Emerging Structure of

This analysis of the reasons for the development of N.A.T.O. is considered to be correct; it does not, however, seem to be correct to say that either post-war political conditions, or these treaties, can alter the legal concept of self-defence. To distort that concept to cover collective action by States, some of which may have no right of self-defence, may produce a politically desirable result; it does not produce a legal basis for such action recognized by international law. If the juridical concept of self-defence is to have any meaning it must, in our view, be distinguished from collective action for the purpose of maintaining international peace and security within a defined region. The latter we would characterize as collective security action.<sup>1</sup>

This is not to suggest that such collective security action is illegal; but, not being self-defence, the legality depends on considerations different from those governing the legality of action in collective self-defence. The other considerations are, firstly, that until the Charter is amended or abandoned it is the Security Council which is invested with primary responsibility for collective security,<sup>2</sup> whether regional or global. It follows that normally the prior authorization of the Security Council is a condition precedent to the right of Members to take collective security action; this is borne out by Article 52, which prevents regional arrangements from taking such action except with prior authorization from the Security Council. Secondly, since the responsibility of the Security Council is primary and not exclusive, and since the Security Council may well be prevented from fulfilling its responsibilities due to the lack of unanimity amongst the permanent members, there is a secondary responsibility on the totality of the United Nations Members. Yet this responsibility lies on the totality of Members acting collectively; the reference to 'collective measures' in Article 1 (1) of the Charter must mean measures taken on the authorization of the totality of the Members as represented by the General Assembly, and not to groups of Members as represented by a regional arrangement or collective security organization. There is, since the General Assembly Resolution on Uniting for Peace of 3 November 1950,<sup>3</sup> a specific procedure set up whereby the General

Collective Security Arrangements, 'The North Atlantic Treaty', in *Proceedings of the American Society of International Law*, 1950, p. 9.

<sup>1</sup> For the difference between the two concepts see Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations', in *American Journal of International Law*, 42 (1948), p. 783.

<sup>2</sup> Article 24 of the Charter of the United Nations.

<sup>3</sup> General Assembly, *Official Records*, 5th Session, Plenary Meeting, pp. 341-7. The legal character of action taken pursuant to a recommendation of the General Assembly under this Resolution is, in our view, that of 'collective measures' for the purpose of maintaining international peace and security (Article 1 (1)). This seems to follow from the Resolution itself, which refers to recommendations 'with a view to making appropriate recommendations to Members for collective measures . . . to maintain or restore international peace and security'. For a similar construction see Kelsen, *Recent Trends in the Law of the United Nations* (1951), p. 975. See also McDougall and Gardner, 'The Veto and the Charter: an Interpretation for Survival', in *Yale Law*



Assembly may recommend or authorize Members to take action of this kind when the Security Council fails to fulfil its primary responsibility due to the lack of unanimity of the permanent members. It is submitted, therefore, that before individual Members or groups of Members can take collective security action (as opposed to action in collective self-defence) it must clearly be shown that both the Security Council and the General Assembly have failed to take the necessary action. Only then can it be said that Members have a residual responsibility in the matter. Moreover, whereas the failure of the Security Council may be explicable by reason of the power of veto, this cannot be said of the General Assembly; the 'failure' of the General Assembly can only be attributed to a refusal of the necessary two-thirds majority of Members to take or authorize collective measures in the circumstances. In identical circumstances the action of a number of States, parties to a collective security arrangement, in arrogating to themselves the right to take collective action when the General Assembly itself is not prepared to recommend such action, would be extremely suspect.<sup>1</sup>

The danger of conceding to individual States, or even groups of States, the right to take collective security action unauthorized by the competent organs of the United Nations, lies in the possibility that antagonistic groups may each reach a decision that action is necessary 'to maintain or restore international peace and security', and under a claim of right plunge the world into war.<sup>2</sup> It was for this reason that the Royal Institute of International Affairs Study Group in 1938 considered that, in order to prevent regional pacts degenerating into alliances of the pre-war pattern, an essential

*Journal*, 60 (1951), p. 258, at pp. 288-91; and Woolsey, 'The Uniting for Peace Resolution of the United Nations', in *American Journal of International Law*, 45 (1951), p. 129, at p. 137. The view has been taken that this Resolution is itself based upon the right of collective self-defence preserved under Article 51. See Stone, *Legal Controls of International Conflict*, at p. 275: 'The Uniting for Peace Resolution A is thus seen to fit into the anarchic self-defence derogation from the Charter far more naturally than it can be forced (if it can be forced at all) into its collective peace enforcement provisions.' Various delegates have, in the debates on the Resolution, also attempted to argue against its validity on the basis of Article 51. See General Assembly, *Official Records*, 5th Session, 360th, 361st, 364th Meetings of First Committee. This view is, in our opinion, mistaken; the Resolution contemplated action for collective security, not collective self-defence. See Waldock, 'The Regulation of the Use of Force by Individual States in International Law', in *Recueil des Cours*, 81 (1952), at p. 505, for a rejection of the view that the Acheson Plan is based on self-defence rather than the General Assembly's secondary responsibility for the maintenance of international peace and security.

<sup>1</sup> Bebr, 'Regional Organisations: A United Nations Problem', in *American Journal of International Law*, 49 (1955), p. 175, concedes that 'It is conceivable that such a recommendation might be used in an attempt to curb the independence of regional organisations and initiate some United Nations control over them'.

<sup>2</sup> This danger was also realized when, in the Locarno Pact, Article 4 distinguished between aggression, which gave parties generally a right to intervene only on the authorization of the Council of the League, and 'flagrant' aggression, which gave a right to intervene immediately: Treaty of Mutual Guarantee, Locarno, 16 October 1925 (text reproduced in *American Journal of International Law*, 20 (1926), Supp., p. 22). The definition of a 'flagrant' aggression in Article 2 still leaves room for a subjective judgment, just as the definition of aggression does; the same problem remains.

condition of their right to take action for the maintenance of international peace and security was that they should act only with the prior authority of the Council of the League or of the Permanent Court of International Justice.<sup>1</sup> It was, it appears, a realization of this danger which at San Francisco led to the rejection of the Australian proposal that in the event of the Security Council failing to act each Member State retained the right to take such action as it deemed necessary in the interest of international peace and security.<sup>2</sup> For similar reasons writers have urged neutrality rather than intervention in a conflict in which the aggressor has not been determined by a competent organ of the United Nations.<sup>3</sup> The General Assembly Resolution on the Duties of States in the Event of the Outbreak of Hostilities<sup>4</sup> provides that a State engaged in hostilities should 'take all steps practicable in the circumstances and compatible with the right of self-defence to bring the armed conflict to an end at the earliest possible moment'; a general right of intervention conceded to the allies of the immediate participants could scarcely be regarded as consistent with the aim of this Resolution. The concession to every State of a right to determine whether action is in the interest of international peace and security (and against which State or States) brings about a potentially anarchical situation. It is, therefore, an additional reason for restricting the concept of collective self-defence; in stating that this concept requires each participating State to be exercising an individual right of self-defence, based on a violation of its own substantive rights, we believe this is the maximum concession which can be made if the prohibition of Article 2 (4) is to retain any meaning.

It is readily admitted that once we assume the impotence of the competent organs of the United Nations, this view has serious disadvantages. To oppose all collective action (other than what is strictly self-defence) which is not sanctioned by a competent United Nations organ on that assumption would open the way for piecemeal aggression; each victim would fall in turn, with no hope of assistance from friendly nations. There are, however, weighty reasons against accepting these serious disadvantages as conclusive arguments against taking a restrictive view of self-defence. Firstly, these practical disadvantages stem from the system of rights and duties with which Members surrounded themselves on signing the Charter; the restrictions contained in the Charter on the freedom of unilateral

<sup>1</sup> *International Sanctions* (1938), p. 135.

<sup>2</sup> In Committee III/4, at the 2nd Meeting on 9 May (U.N.C.I.O., Docs., vol. xii, p. 668). And see the New Zealand proposal to include a collective guarantee of every Member against aggression, also rejected: 1st Commission, General Provisions, 6 June 1945 (U.N.C.I.O., Docs., vol. vi, pp. 343-4).

<sup>3</sup> See Jessup, *Modern Law of Nations* (1948), p. 205.

<sup>4</sup> Resolution 378 (V), 17 November 1950. The original Yugoslav proposal contained terms advocating a withdrawal of troops within twenty-four hours (Doc. A/1399, 27 September 1950). The Resolution omitted any specific time-limit.



action, of action involving force unsanctioned by the competent United Nations organ, were really feasible only on the assumption that the Security Council would fulfil the responsibilities assigned to it. In fact it has not done so, but the consequences of this, however disappointing, are reasons for questioning the political wisdom of the Charter scheme; they are not reasons for extending and distorting the legal concept of self-defence. The content of that legal right is not subject to change due to an admittedly inconvenient political position. Secondly, the disadvantages have been mitigated by the assertion by the General Assembly of the right to recommend to Members the taking of action to maintain or restore international peace and security; since the Acheson Plan, it is not possible to make the assumption that there is no competent organ of the United Nations really capable of authorizing collective action in the interests of international peace and security. This new development seems to take the force from the argument, of a political rather than legal character, for extending the concept of collective self-defence to cover intervention by any State to assist the victim of an aggression.

There does, however, remain the final problem, inherent in any system of collective security, of the legality of action to assist a State pending the decision of the competent organ. Even under the Acheson Plan, although an emergency meeting of the Assembly may be called within twenty-four hours, the necessary investigation of the facts or even the formal procedure for taking a decision may take time. As Kelsen has said:

‘Between the moment the illegal attack starts and the moment the centralised machinery of collective security is put into action, there is, even in case of its perfectly prompt functioning, a space of time, an interval, which may be disastrous to the victim.’<sup>1</sup>

During the interim period, pending a decision of the competent organ of the United Nations, the victim State is not devoid of assistance, for those of its neighbours who are themselves placed under the necessity of self-defence by the illegal attack, whose own right of self-defence is actuated by the attack, may exercise this right of self-defence in concert with the original victim. If prior provision has been made for this action in collective self-defence by treaty, so much the better. Moreover, the greater the scale of the attack the wider the range of neighbouring States imperilled by the attack and able to invoke their right of self-defence. This right would not, in our opinion, justify a general right of intervention at this stage; States not individually in a state of self-defence would have no right to take action or join in collective action.<sup>2</sup> To allow them to do so would, at this stage,

<sup>1</sup> In *American Journal of International Law*, 42 (1948), p. 785.

<sup>2</sup> If it be argued that the only State capable of taking effective action might be a State not itself in a position to invoke the right of self-defence, then it is suggested that this State must

completely nullify the whole system of collective security and signal a return to the very anarchy which the system of collective security is designed to prevent. The right of States which are not acting in self-defence to intervene must await the authorization of the competent organ of the centralized machinery, and this obligation cannot be avoided by a perversion of the concept of collective self-defence.

The point may be illustrated by the attitude of the United States towards its intervention in Korea to assist the Republic of South Korea. The Security Council had by a Resolution of 25 June 1950<sup>1</sup> noted the 'armed attack' upon South Korea and determined that the action of the North Korean authorities in invading South Korea constituted a 'breach of the peace'; the Resolution also called upon Members 'to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities'. There was no direct finding that the Republic of South Korea was in a position of self-defence, although the use of the phrase 'armed attack' and the condemnation of the North Korean authorities make this tolerably clear.<sup>2</sup> Assuming that South Korea exercised its right of self-defence, the character of the United States intervention in the conflict, by the authorization of the use of air and sea forces against the North Korean armies, becomes important; for that authorization was given prior to the second Resolution of the Security Council on 27 June<sup>3</sup> which recommended that Members 'furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security'. Two constructions are possible: firstly, that the United States intervened in the exercise of the right of collective self-defence.<sup>4</sup> This is a possible view, for the United States was still in military occupation of Japan and its interests in the Pacific had been affirmed on many occasions. Secondly, the intervention may be regarded as action authorized by the Security Council in its Resolution of 25 June; this, in fact, was the view which the United States took and maintained at the 474th Meeting of the Security Council,<sup>5</sup> supported by the French delegate.<sup>6</sup> Whether or not this initial Resolution justified the action of the United States is debatable;<sup>7</sup> it is, however, clear that the

obtain the authorization of a competent organ of the United Nations before going to the assistance of the actual victim.

<sup>1</sup> U.N. Doc. S/1501.

<sup>2</sup> See also the Security Council Resolution of 7 July 1950 (U.N. Doc. S/1588) which welcomed the support given by Members 'to assist the Republic of Korea in defending itself against armed attack and then to restore international peace and security in the area'. Kelsen, *Recent Trends*, p. 927, assumes that the Security Council intended to act under Article 51, with the necessary implication that South Korea was in a state of *self-defence*.

<sup>3</sup> U.N. Doc. S/1511.

<sup>4</sup> See Stone, *op. cit.*, p. 231.

<sup>5</sup> Security Council, *Official Records*, 5th Year, 474th Meeting, pp. 3-5.

<sup>6</sup> *Ibid.*, p. 9.

<sup>7</sup> Kelsen, *op. cit.*, p. 931; Stone, *op. cit.*, p. 231, n. 13. The Resolution called upon Members 'to render every assistance to the United Nations', not to South Korea; only the Resolution of 27 June did that.



United States sought to justify its action by reference to an authorization of the Security Council, and not by reference to some residual power to intervene in order to maintain international peace and security.

If it should still be contended that in an age of nuclear warfare the destructive power of an initial attack could completely destroy a State entitled to assistance only from other States placed under the necessity of exercising their right of self-defence, then it is only possible in reply to suggest that the technological advances of modern warfare may well have made any system of collective security *simpliciter* archaic and outmoded. The only real solution to this problem lies either in combining the system of collective security with some means for depriving all the individual States of the kind of armaments which, by their immediate destructive power, make the system unworkable; or in moving towards a system of world federation in which component States would be completely disarmed. It is not the intention in the present article to ignore these difficulties, but only to state the conviction that they are not solved by distorting the concept of self-defence, individual or collective, out of all legal recognition.

# 'FEDERAL STATE' CLAUSES IN MULTI-LATERAL INSTRUMENTS

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ALREADY over 40 per cent. of the people in the world live in countries with Constitutions that call themselves federal. This percentage is tending to increase as federalism is called upon to play an important part in the transformation of former colonial areas into self-governing States. Thus the question of the competence of federal States to give effect to international obligations—particularly those obligations which involve subjects normally within the competence of the units of the federation—has recently assumed special significance. It is plain that at the present time international law is impinging on national constitutional law with greater and greater momentum, and that it has become difficult for some federal Governments to reconcile the provisions of national Constitutions with international necessities. The tension between treaty obligations and federal Constitutions is perhaps the most important current aspect of the perennial problem of the relationship between international and municipal law.

The dilemma of the federal State in the treaty process is illustrated in the reply of the British Government to a League of Nations questionnaire on the international responsibility of States:

'... where the constitutional arrangement(s) prevailing in a State vest the responsibility for external affairs in a common or central Government while vesting the responsibility for other matters in the Government of a subordinate unit, ... responsibility for the fulfillment of the obligations prescribed by international law rest(s) upon the Government conducting the foreign or external affairs of the State. It is with that Government alone that foreign States maintain relations. The distribution of powers between itself and the other or subordinate units on whose behalf it is entitled to speak is a domestic matter with which foreign States are not concerned. A Government which is the appointed organ for the conduct of the foreign affairs of other units cannot evade responsibility by alleging that constitutionally its powers of control over these units are inadequate to enable it to enforce compliance with international obligations.'<sup>1</sup>

Such a rule of international law poses few constitutional problems with respect to many treaties, the obligations of which can be discharged by national (or even by executive) action alone. Bilateral treaties of the

<sup>1</sup> League of Nations, Conference for the Codification of International Law, *Bases of Discussion*, 1929. V. 3, p. 122. One commentator has said that 'it is an advantage which federal states enjoy in comparison with unitary states that they can adhere to conventions of the most edifying character without the prospect of having to take the immediate responsibility of implementing them or to incur the odium incidental to default': Angus, 'The Canadian Constitution and the United Nations Charter', in *Canadian Journal of Economic and Political Science*, 12 (1946), p. 127, at p. 133. Such a statement could hardly be more erroneous.



traditional cast—treaties of defence, friendship, navigation, and commerce—are generally of this type. It is otherwise, however, with the 'law-making' treaty embodied in multilateral conventions. A great number of these conventions, because their provisions concern matters within the legislative competence of the constituent units, pose for federal States fundamental constitutional problems. In these circumstances it is not surprising that such States should suffer from what one observer has called 'treaty indigestion'.<sup>1</sup>

It is perhaps misleading to speak of *the* federal problem in treaty ratification, since those nations which are labelled federal exhibit in fact considerable variation in their constitutional structures. They differ most obviously in the constitutional allocation of powers between the central and regional Governments. In the highly centralized quasi-federal States of Latin-America and eastern Europe, for example, legislative powers are so concentrated in the central Government that it is unlikely that any international instrument would touch on a matter reserved to the sphere of provincial autonomy. To the extent that multilateral instruments seek to regulate matters within the field of federal powers, it is evident that no problem arises; the federal State is in these circumstances in exactly the same position as a unitary State.

Even those genuinely federal States which have reserved a substantial area of legislative competence to their constituent units differ *inter se* in a further respect. In some federations the treaty power is plenary and can be exercised independently of the allocation of powers otherwise secured by the Constitution, so that treaty-implementing legislation can trench upon matters normally reserved to the constituent units. In the United States of America, Australia, Switzerland, and India this is the case; hence, to the extent that the federal structure of these countries poses an obstacle to ratification of international conventions, that obstacle is more political than legal. But in other federations—notably Canada—the federal treaty-implementing power is limited to the sphere in which the central Government could legislate, absent a treaty; hence treaty implementation may require the concurrent action of provincial legislatures. It is here that a genuine constitutional *non possumus* may arise with respect to many international conventions.

Obviously no principle of international law can be adduced against a federal Government which hesitates to conclude a treaty on the grounds that the Government is not constitutionally empowered fully to implement its terms. But it has nevertheless been thought desirable to devise a method whereby federal States can participate in international legislation without subjecting their constitutional systems to stress. Thus federal

<sup>1</sup> Wilcox, *The Ratification of International Conventions* (1935), p. 113.

States have frequently proposed in international conferences that draft conventions should contain a clause allowing them to ratify the instrument without undertaking to give effect to those provisions which would require action by their constituent units.

The 'federal State' clause, then, is a method of qualifying multilateral treaty obligations at their inception. Such a clause is a concession granted to federal States in view of their peculiar constitutional structure. Concession it certainly is, for its main effect is to create a disparity of obligations between federal and unitary signatories to multilateral instruments. Various formulas have been suggested in connexion with different instruments, but the common feature of such clauses is that ratification by federal States will not constitute a legal obligation to observe the convention in so far as its provisions fall under the reserved powers of the constituent States.

The question of a 'federal State' clause has been extensively debated in the two international organizations which are the main sources of multilateral treaty legislation—the International Labour Organization and the United Nations.<sup>1</sup> The reason for this is that both labour conditions and human rights are matters which tend to fall predominantly within the ambit of State or provincial legislative jurisdiction in the main federations. It is the purpose of this article to examine the present position in the light of the experience of each of these two international organizations, and to assess the prospects of the federal State clause as a device for reconciling the needs of national federalism with the requirements of the international community.

### I. *The International Labour Organization*

#### *Background of the original federal State clause*

The supreme importance of the issue of federalism in relation to the formation of the International Labour Organization has not been generally realized. In fact, the Commission responsible for drafting the Constitution of the I.L.O. in 1919 very nearly foundered on the issue of federalism.<sup>2</sup> In this Commission it was the representatives of the United States who raised, stressed, and defended the needs of federalism against the opinion of the majority. Most of the changes in the structure of the Organization away from the proposals of the British delegates were made in the interests of the American representatives, who stated what they conceived to be the essential needs of the United States as the outstanding federal Government in

<sup>1</sup> For authoritative accounts of the earlier debates in the United Nations, see Liang, 'Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments', in *American Journal of International Law*, 45 (1951), p. 108; and Sørensen, 'Federal States and the International Protection of Human Rights', *ibid.*, 46 (1952), p. 195.

<sup>2</sup> The most authoritative account of the history of the question is that by Phelan, in *The Origins of the International Labour Organisation*, edited by James T. Shotwell (1934), vol. i, pp. 127 ff.



international labour co-operation. Ironically enough, although the special privilege afforded to federal States in the shape of the federal State clause was directly due to American demands, the United States itself did not join the Organization until 1934, and has since ratified only seven out of the 103 conventions adopted by the International Labour Conferences up to 1955, the smallest number ratified by any major nation.<sup>1</sup>

The original federal State clause had its origin in a compromise between the British and American proposals which were before the Commission. The original British proposal involved an obligation to ratify all Conventions, which was to take place automatically unless the legislature of the particular State concerned actively expressed its disapproval of ratification. During the preliminary deliberations of the British delegation Sir Robert Borden did raise the question of the application of the scheme to federal States such as Canada, Australia, and the United States. However, he considered that the difficulty could be overcome and the question was not examined in detail.<sup>2</sup>

When the British plan was submitted to the Commission on 2 February 1919, it met vigorous objections from the American delegates, who pointed out that the British draft was specially designed for unitary Governments and that, as in the United States labour matters lay within the jurisdiction of the States, the Federal Government could not undertake obligations which it would not be able to fulfil.<sup>3</sup> Accordingly, the problem was referred to a drafting sub-committee for consideration.

Sir Malcolm Delevingne, who acted as Rapporteur for the sub-committee, presented the revised draft on 10 March 1919. By this draft<sup>4</sup> one subsection of Article 19 was to read:

‘... In the case of a Federal State, if the power of legislation on any matters dealt with in a convention rests with the legislatures of the constituent States, the High Contracting Party shall communicate the convention to the constituent States, and each such State may adhere separately to the convention. Notification of the adhesion of any such State through the Federal Government to the Director shall be deemed to be the ratification of the convention in respect of that State.’

The implication of decentralization involved in this draft met with opposition from the delegates of several unitary States. Mr. Barnes (Britain) thought it imperative that the unity of the United States should not be rendered doubtful. He raised the question whether one consequence of this draft would not be to admit that each State within a federation was entitled to separate representation in the General Conference. The implications of this were alarming, for if Canada and Australia followed the

<sup>1</sup> International Labour Organization, *Official Chart of Ratifications of International Labour Conventions to June 1, 1955*.

<sup>2</sup> See Phelan, *op. cit.*, vol. i, p. 123.

<sup>3</sup> *Ibid.*, vol. ii, p. 198.

<sup>4</sup> *Ibid.*, vol. i, pp. 395-6.

example of the United States, the Conference would become an enormous Congress and the difficulty of doing useful work would be greatly increased. Mr. Barnes emphasized that a formula would have to be found allowing States with federal Constitutions to bind themselves as effectively as other States. That was such an essential point that one could not admit the supposition that the difficulty could not be overcome.<sup>1</sup>

M. Vandervelde (Belgium), however, pointed out that the only real solution of the difficulty in question was that of securing an alteration in the Constitution of the United States.<sup>2</sup> Failing this solution, the alternative was to be satisfied with a makeshift compromise. As a matter of fact, the United States could not be represented in international conferences otherwise than by a representative of the Executive Federal Authority. There remained the question of considering how the decisions taken by a conference in which the United States was so represented could be ratified. Provisions for such ratification must be made in accordance with the facts as they actually were. If it was the State legislatures which were competent, then the Federal Power must submit its decisions for ratification by the forty-eight Legislatures, and bind itself to take all steps in its power to obtain within the fixed limit of time these forty-eight ratifications. This would be a complicated procedure, and not a very satisfactory one. Nevertheless, it was better than the suggestion of the American delegate that representation be given to the separate constituent States. This would have had the effect of rewarding the federal States for their decentralized system of labour legislation to the detriment of other countries, which had abandoned this decentralization and which had recognized that labour legislation should be uniform for the whole country.

Mr. Samuel Gompers, the American delegate, opposed the arguments of M. Vandervelde and Mr. Barnes, and emphasized two points.<sup>3</sup> First, it was not correct to say that the American States were not completely 'self-governing'. They were 'self-governing' as regards precisely the questions under consideration, namely, labour legislation. Such legislation came under the heading of what was called the 'police power' of the separate States, and this power was specially reserved by the Tenth Amendment to the American Constitution to the separate States. The decision recently given by the United States Supreme Court declaring unconstitutional the federal Child Labour Law was the best evidence in support of the attitude taken by the American delegation. Secondly, whether one liked it or not, it was a very difficult thing to change the American Constitution. Further, the decentralization of powers in the Constitution corresponded to the diversity of its territory and its great geographical extent.

<sup>1</sup> See Phelan, *op. cit.*, vol. ii, p. 192.

<sup>3</sup> *Ibid.*, vol. ii, pp. 199-200.

<sup>2</sup> *Ibid.*, vol. ii, p. 199.



After this exchange of views, the matter was again referred back to the drafting sub-committee. A second revised draft was presented on 24 March 1919.<sup>1</sup> It provided:

'In the case of a Federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of the Government of such State to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case.'

Sir Malcolm Delevingne, as Rapporteur, summarized the work of the sub-committee and pointed out that the new federal State clause made certain modifications in the original scheme.<sup>2</sup> The main modification was to provide that in the case of a federal State the Government of such State might elect to treat a 'Draft Convention' as a 'Recommendation'. The report pointed out that this modification was of great importance in so far as it would place the United States and any other State in a similar position on a different footing from and under a lesser degree of obligation than other States in regard to Draft Conventions adopted by the Conference. The report, however, drew attention to two important points, namely, that the exception extended only to federal States which are subject to limitations in respect to their treaty-making powers on labour matters, and, secondly, that the exception only extended in so far as those limitations applied and no further. Sir Malcolm Delevingne added that the British delegation had come to the conclusion after full consideration that it was desirable to accept these new proposals and they therefore recommended their adoption to the Commission.<sup>3</sup>

Mr. Robinson, the American delegate, accepted the Rapporteur's statement but said that he wished to point out that the word 'limitations' meant not only constitutional limitations but also other limitations such as judicial limitations,<sup>4</sup> and that, if this were accepted, the American delegation was prepared to accept the new Article. He further indicated that if the new Article were accepted, the American opposition to the Articles dealing with sanctions would be withdrawn. The new Article containing the federal State clause was then put to the vote and adopted, ten votes being cast in its favour and there being four abstentions.<sup>5</sup> The Article was embodied in the report of the Commission to the Plenary Session of the Peace Conference on 11 April 1919, and ultimately became Article 405 of the Treaty of Versailles, although it will be referred to in the present article as Article 19 of the Constitution of the I.L.O.

It can be seen from the above that the influence of the American

<sup>1</sup> See Phelan, *op. cit.*; vol. i, p. 436.

<sup>2</sup> *Ibid.*, vol. i, p. 160.

<sup>3</sup> *Ibid.*, vol. i, p. 161.

<sup>4</sup> *Ibid.* No one has ever discerned what Mr. Robinson meant by this distinction.

<sup>5</sup> *Ibid.*, vol. i, p. 161.

delegation was decisive in the drafting of the federal State clause. The American representatives expressed themselves as unable to agree to any partial scheme which would only render ambiguous the obligations of a federation. They felt, as Professor Shotwell (one of the American delegates) has put it, that it 'was carrying them beyond the limitations of their Constitution as well as against the traditions of their industrial history'.<sup>1</sup> In 1918, the United States Supreme Court had decided *Hammer v. Dagenhart*,<sup>2</sup> the famous child labour case, in which it refused to allow Congress to stretch its powers over inter-State commerce so as to prohibit the commerce of goods in the making of which child labour had been employed. Public opinion, as Shotwell notes, was obviously working towards the recognition of national labour legislation by way of Congress, but the United States delegates 'could not anticipate history, and could not risk guaranteeing any such interpretation of American political tendencies in an international agreement'.<sup>3</sup>

It became obvious that what the American representatives desired above all was liberty for their Government to choose the means for giving effect to the decisions of the International Labour Conference. At one meeting of the Commission, Mr. Gompers (an American delegate) pointed out that the example of the United States legislation on white phosphorus was proof of what could be done without international obligation. He said:

'The United States had not participated in the 1906 Convention which prohibited use of this material, and moreover the Federal Government had not the right of taking steps to secure the prohibition of its use in the United States; but it had been able to prohibit the importation of white phosphorus, and to tax matches made with this material so severely that their manufacture became hopelessly unprofitable. It . . . had secured the result desired . . . in its own particular way. If they were allowed a certain liberty as to the means, the Commission might be sure that the United States would never fall behind the European countries in labour legislation.'<sup>4</sup>

It was under the influence of this declaration that the Commission eventually yielded to the American point of view and accepted the compromise in the form of the federal State clause. The clause as it stood was specifically designed for the United States, and its draftsmen believed that in that form it would induce the American Government fully to exert its legislative powers within the limits of its authority.

The evidence of history, therefore, convincingly shows that the legal dispute lay only on the fringe of a much wider controversy. Nevertheless, it may be wondered whether the American delegation did not misrepresent the American legal position in its arguments. To be sure, *Hammer v.*

<sup>1</sup> *Labour as an International Problem*, edited by Solano (1920): Chapter on 'The Historical Significance of the International Labour Conference' by Shotwell, p. 57.

<sup>2</sup> (1918), 247 U.S. 251.

<sup>3</sup> Shotwell, loc. cit., p. 60.

<sup>4</sup> *Report and Minutes of the Commission on International Labour Legislation*, p. 280.



*Dagenhart* had been decided only the year before. And *Missouri v. Holland*,<sup>1</sup> which clearly established federal treaty paramountcy, was not to be decided until the year following. But even before the decision of *Missouri v. Holland* there was a long line of clear precedent, dating back to *Ware v. Hylton*,<sup>2</sup> for the principle that action by treaty imports an enlargement of federal legislative powers enabling the federal Government to execute the provisions of the treaty. Indeed, support for this view was given at the Peace Conference by certain distinguished American lawyers then in Paris (including Felix Frankfurter), who were of the unanimous opinion that the constitutional difficulties could be overcome.<sup>3</sup> This conclusion is more than justified by later authoritative opinions on the point of law, and the decision in *Hammer v. Dagenhart* itself was in fact overruled in 1941,<sup>4</sup> with the result that even in the absence of a treaty the jurisdiction of the federal Government over labour conditions is broader today. But writing in 1934, before this reversal had occurred, and emphasizing only the scope of the federal treaty power, Professor Manley O. Hudson maintained:

'Is the United States "a Federal State, the power of which to enter into conventions on labour matters is subject to limitations"? Certain members of the American delegation at Paris in 1919 would have answered this question in the affirmative, but a negative answer would be more in keeping with the practice of the United States, more consonant with the development of our national life in the United States, and more appropriate to our position in world affairs.'<sup>5</sup>

Thus it appears that the American delegates asserted, as constitutional objections to full American participation, a body of doctrine concerning States' rights which had been virtually discarded by the end of the nineteenth century. Perhaps it is a harsh judgment, but either the American delegates were misguided and misinformed or they were not wholly sincere in their support of the international labour movement.

The federal State clause was, in short, a concession made with reluctance and mainly to secure American support. The Commission realized that without the support of the United States the Organization had little chance of survival at the Peace Conference. These considerations overrode the fears of unitary States that the resulting inequalities between States would undermine the Organization, inasmuch as they would diminish its powers and reduce its effectiveness. Article 19 (9)—the federal clause—cannot be construed as a sympathetic acknowledgement of the peculiar form of government of the federal State and a willing recognition of the differences

<sup>1</sup> (1920), 252 U.S. 416.

<sup>2</sup> (1796), 3 Dall. (U.S.) 199.

<sup>3</sup> See Phelan, *op. cit.*, vol. i., p. 155.

<sup>4</sup> The case which expressly overruled it was *United States v. Darby* (1941), 312 U.S. 100.

<sup>5</sup> Hudson, 'Membership of the United States in the International Labour Organisation', in *American Journal of International Law*, 28 (1934), p. 673.

between it and a unitary State. It was a compromise, necessary to save the life of the embryo Organization, and nothing more.

The early drafts of the I.L.O. Constitution considered by the Commission in 1919 envisaged Conventions as the sole legislative instrument for achieving the objects of the Organization. It was as the result of the discussions of the Commission concerning the problem of federal States that provision was made for Recommendations as an additional legislative instrument. A Recommendation is submitted to Members of the I.L.O., not for 'ratification', but for 'consideration with a view to effect being given to it by national legislation or otherwise'.

It is important to appreciate that the provisions of Article 19 (9) were not thought to apply to all federal States in all circumstances, but only to certain federal States in certain circumstances. From the minutes and records of the Commission it is clear that this exceptional provision was only intended to have any effect at all if certain assumptions as to the existence of limitations upon the treaty power of federal States should prove correct, and then only to the extent to which they should prove correct. Two passages from the preparatory work afford ample proof of this. Sir Malcolm Delevingne, when reporting to the Commission on behalf of the sub-committee which drafted the compromise text, spoke as follows:

'A State will not be able to take advantage of the exception on any ground except that of actual existing limitations on its powers which prevent it entering into a labour Convention. And a State in which such limitations exist will only be able to claim the exception in regard to Conventions to which the limitations apply. If a Convention is proposed by the Conference to which the limitations do not apply and which is within the competence of the federal Government, then the general provisions of the scheme in regard to Conventions will apply and the State will be under the same obligations as any other State. Also, if in the course of time the limitations are removed, those obligations will automatically apply.'<sup>1</sup>

The Commission itself was equally emphatic in its report to the Plenary Session of the Peace Conference, remarking that

'... the exception in the case of federal States is of greater importance. It places the United States and States which are in a similar position under a less degree of obligation than other States in regard to draft Conventions. But it will be observed that the exception extends only to those federal States which are subject to limitation in respect of their treaty-making powers on labour matters and, further, that it only extends in so far as those limitations apply in any particular case. It will not apply in the case of a Convention to which the limitations do not apply or after any such limitations as at present exist have been removed.'<sup>2</sup>

Thus where constitutional limitations do not apply and the assumed conditions to which the federal State clause was intended to apply accordingly do not exist, federal Members of the Organization were not considered

<sup>1</sup> See Phelan, *op. cit.*, vol. ii, pp. 362-3.

<sup>2</sup> *Ibid.*, p. 374.



discharged from the obligation to consider Conventions with a view to their ratification. Their obligation was then to be that of unitary States, namely, to submit each Convention to the authority which is competent to give effect to Conventions as Conventions. Their federal structure was in this case to be relevant only as one of the elements to be taken into account by those deciding as a matter of policy whether a particular Convention should be ratified, and was not to qualify the nature of the Members' obligation in relation to the decisions of the Conference.

### *The federal State clause in operation*

The actual wording of the federal State clause calls for some discussion. What is the meaning of the words 'the powers of which to enter into conventions on labour matters is subject to limitations'? The phrase is very curious, and it seems a little difficult to understand why 'give effect to' was not inserted instead of 'enter into'. It is clear that the draftsmen mainly had in mind the peculiar position of the treaty-making power in the United States, where emphasis is placed on the validity of the treaty instead of the legislation ancillary to its execution.<sup>1</sup> In the Commonwealth Federations the emphasis is laid rather on the validity of the legislation,<sup>2</sup> and there are no 'capacity' limitations on the treaty power as such. But literally taken, the language of the federal State clause applies to no State that is a Member of the Organization, for no I.L.O. Member—not even Canada—is by reason of federalism subject to limitations of *power* to *make* treaties on labour matters. This drafting obscurity was one of the reasons for the Montreal Amendments of 1946.<sup>3</sup> But in 1919 apparently no one took the trouble to differentiate between 'capacity' and 'performance' limitations on the treaty process.

Apparently none of the main Federations in 1919 entertained any doubt that it was included within the purview of the federal State clause. The question with which they were mainly concerned was, who is 'the authority or authorities within whose competence the matter lies for the enactment of legislation or other action' within the meaning of Article 19 (5).

The federal State clause—Article 19 (9)—provided simply that whenever the power of a federal State to enter into labour conventions was limited, the Governments would be permitted to treat a draft Convention as a Recommendation, thereby being subjected to fewer obligations. Nevertheless, the International Labour Office from the outset encouraged formal ratification whenever possible and by its action hoped to avoid the use of the federal

<sup>1</sup> See Anderson, 'Extent and Limitations of the Treaty Power', in *American Journal of International Law*, 1 (1907), p. 636; Quincy Wright, 'Conflicts of International Law with National Law and Ordinances', *ibid.*, 11 (1918), p. 1; 'The Constitutionality of Treaties', *ibid.*, 13 (1920), p. 342.

<sup>2</sup> See, for example, *Roche v. Kronheimer* (1921), 29 C.L.R. 329.

<sup>3</sup> See *infra*, pp. 170-81

State clause in all but exceptional cases. If there was a loophole, the Labour Office hoped to block it. But it was recognized by the Office that occasional use of the privilege would permit the ratification of certain Conventions by federal States in spirit if not in actual form.

The case of Switzerland seemed to be on the way to an early solution when the Swiss Federal Council in December 1920 stated that the Federal Assembly was competent to give international conventions the force of law 'even in the cases in which the Confederation has no constitutional right to legislate'.<sup>1</sup> In the Third Session of the Conference in 1921, when the proposed Convention on a weekly rest day was under consideration, the Swiss representatives were much interested in the exceptions proposed in the Convention. It was argued that part of the legislative powers needed to enforce the Convention belonged to the cantons and not to the central Government.<sup>2</sup> The difficulties with Switzerland were not ended with the adoption of the Convention. In 1925 the Swiss Government indicated that it had decided to treat the draft Convention on weekly rest as a Recommendation since it involved questions regulated by cantonal as well as federal law.<sup>3</sup> In such circumstances the federal Government did not wish to assume any international obligations in the matter. The Director was particularly struck by the Swiss position. He replied that the Swiss exception did not fall within the exception of Article 19 (9), since there must be a specific constitutional limitation before use can be made of it.<sup>4</sup> He pointed out that in 1920 the Federal Council had itself asserted the supremacy of the treaty-power of the Confederation. Moreover, in the preparation of the Convention on weekly rest the Swiss Government had been consulted. The opinion of the Government at the time of the questionnaires was that the federal authority might legislate on weekly rest. The Director sensed a danger that federal Governments might transform all the Conventions adopted by the Conferences into Recommendations, creating two very distinct sets of obligations between Members of the Organization. Accordingly he rejected the legitimacy of the Swiss claim to invoke the federal State clause. Several years later Switzerland ratified the Weekly Rest Convention.<sup>5</sup>

In September 1925 the German Federal Government informed the Labour Office that it proposed to consider the draft Convention concerning the age of admission of children to agricultural work as a Recommendation.<sup>6</sup> It stated that the Convention involved certain measures of a detailed nature which could be taken only by the constituent States of the Reich. Specifically, it was urged that the relation of the Convention to education would require the federal Government to go too far into the field of educa-

<sup>1</sup> I.L.O., *Official Bulletin*, iii (1921), pp. 4-10.

<sup>2</sup> International Labour Conference Proceedings, 1921, p. 360.

<sup>3</sup> Report of the Director, 1926, Sect. 52.

<sup>5</sup> Ratification was effected in 1935.

<sup>4</sup> Ibid.

<sup>6</sup> Report of the Director, 1926, pp. 120-3.



tion reserved to the *Länder*. The federal Government, it was argued, could only lay down general principles concerning the problem. The Director of the International Labour Office protested against this interpretation in his correspondence with the German Government.<sup>1</sup> He contended that the German Government's broad interpretation of Article 19 (9) was against the spirit of the Treaty, and further that the full delegation of the treaty-power to the central Government made ratification by Germany possible. Following a general explanation of the Convention and its obligations by the Director, the German Government notified the Office that it would not take advantage of the federal State clause. At the same time the German officials maintained the correctness of their interpretation of the Reich's use of the clause in matters not within the competence of the Reich.

In 1928 the Director was able to express a sense of satisfaction that those States 'which might take refuge behind their federal constitution . . . are nevertheless endeavouring by agreement between the separate States and by inter-State Conferences to take their part in the general work of ratification'.<sup>2</sup> His sanguine view that a fine spirit of co-operation would prevent federalism from becoming an obstacle to ratification was not, however, borne out by events.

The Australian interpretation of the federal State clause was very broad indeed. As an illustration of this broad interpretation nothing more typical can be cited than a passage from the Report of the Royal Commission on the Australian Constitution, issued in 1929:

'The Conventions agreed upon by the International Labour Conference at Geneva have from time to time been referred to the States by the Commonwealth Government on the assumption that to give effect to them by legislation was not within the power of the Commonwealth Parliament, and also because under Article 405 of the Treaty of Versailles the Commonwealth is entitled to treat Conventions on labour matters as Recommendations only.'<sup>3</sup>

As we shall see, this is a very wide view of the federal State clause. The true interpretation would seem to be that the Commonwealth was entitled to treat Conventions as Recommendations only in so far as its constitutional powers to give effect to them were limited, and no further.

Nevertheless the Commonwealth Government in Australia has habitually treated most Conventions as falling within the residuary State jurisdiction. Until 1929, the course adopted by it was to submit such Conventions to the State Governments, and in so far as the other Members of the Labour Organization were concerned, to treat the Conventions as Recommendations, ratification thereof being therefore impossible. The Conventions

<sup>1</sup> Report of the Director, 1926, pp. 120-3.

<sup>2</sup> Ibid., 1928, p. 7.

<sup>3</sup> Report of the Royal Commission on the Australian Constitution (1929), p. 185. This view at that time had the concurrence of Professor K. H. Bailey, the present Solicitor-General: see Bailey's testimony before the Royal Commission, *ibid.*, p. 1411.

were submitted to the State Governments 'for the latter's information and for any legislation or other action that they may consider it desirable to take', and they were requested to furnish the Commonwealth Government with information as to the position of their domestic law on the subject-matter of the Conventions. In 1927, and again in 1929, the question of ratification was discussed at State Premiers' Conferences, and at the 1929 meeting the Commonwealth Government submitted a Memorandum to the States, announcing

'that it would be prepared to ratify any such Conventions to the provisions of which the States had given effect under their domestic legislation, and in respect to which the States had also given an assurance that they would not modify such legislation so as to make it inconsistent with the provisions of the Conventions, without previous discussion with the Commonwealth'.<sup>1</sup>

The difference between the pre-1929 and the post-1929 policies was not very great. Technically, no doubt, there was a difference, since the post-1929 procedure left open the possibility of ratification, but as far as practical results were concerned the position remained unchanged. The State Governments were under no obligation to submit the Conventions to the State Legislatures for action thereon, and quite naturally were more inclined to give information on existing legislation than to adopt legislative measures in harmony with the Conventions.

This leads us back again to the importance of ratification. The question arose whether, with a view to speeding up the process of ratification, it was permissible for the Commonwealth to ratify a Convention with a reservation as to those provisions not falling within its legislative jurisdiction, or with the qualification that the Convention is not to come into force until the State Parliaments adopt legislation giving effect to these provisions. The latter type of reservation was the subject of some consideration by the International Labour Office. It finally ruled that, unless of a definite character specifying a fixed date for the adoption of legislation by the State Parliaments, such a reservation would be inadmissible, since ratification would become merely a formal act of no importance, giving no guarantee to other Members of the Organization.<sup>2</sup> The specification of a fixed date was deemed impracticable in Australia. As to the former type of reservation, it appears actually to have been adopted by the Australian Government when ratifying three Conventions.<sup>3</sup> The Instruments of Ratification of these three Conventions were expressed thus:

'And whereas such Draft Convention has, in respect of the Commonwealth of

<sup>1</sup> I.L.O., *Official Bulletin*, vol. 14, p. 69.

<sup>2</sup> Final Record of the Fourth Session of the International Labour Conference, Report of the Director, p. 722.

<sup>3</sup> Placing of Seamen (1920), Minimum Wage-fixing Machinery (1928), and Marking of Weight (packages transported by vessels) (1929).



Australia, obtained the consent of the authority or authorities within whose competence the matter lies, and, so far as the subject-matter is within the legislative competence of the Parliament of the Commonwealth of Australia, such action as is necessary to make the provisions of the said Draft Convention effective has been taken . . . ' [followed by declaration of ratification].<sup>1</sup>

The intention was clearly to confine the Commonwealth's responsibility to matters within the limits of its authority,<sup>2</sup> but it is open to strong criticism on grounds of principle. Reservations of this nature are directly opposed to the goal aimed at by the work of the Conference, which is to put international labour legislation on a uniform basis. Furthermore, they are inconsistent with Article 19 (3), which expressly provides that in framing any Draft Convention or Recommendation, the Conference itself shall suggest the modifications required to meet the particular circumstances of any country demanding exceptional treatment. In other words, no reservations are admissible save those actually inserted in the text of the Draft Convention. This is quite aside from the general international law problem of the permissible extent of reservations to multilateral instruments.<sup>3</sup>

The Australian practice regarding ratification of I.L.O. Conventions was not substantially modified as the result of the crucial case of *R. v. Burgess*, decided in 1936.<sup>4</sup> This case, like *Missouri v. Holland* in the United States, clearly established the paramountcy of the external affairs power over State legislative powers. Even after the plenary character of the Australian treaty power was judicially established, however, the Commonwealth Government continued to regard itself as a Government 'the power of which to enter into conventions on labour matters is subject to limitations'. The official view seems to have continued to follow the well-known statement of Professor Berriedale Keith in his works on Imperial Constitutional Law: 'The acceptance by the Commonwealth of the Conventions and Recommendations of the Labour Organisation under the League of Nations is essentially in the form of an obligation to submit the proposals for the acceptance of the States, just as in Canada reference is made to the Provinces.'<sup>5</sup>

The Canadian experience has roughly paralleled that of Australia. It was thought immediately after Canada became a Member of the I.L.O. that the Dominion might apply all the Draft Conventions through the treaty power.

<sup>1</sup> Cf. I.L.O., *Official Bulletin*, vol. 11, pp. 13-14; vol. 16, pp. 40-41.

<sup>2</sup> Cf. in this connexion *Official Bulletin*, vol. 9, p. 211, where a letter from the Prime Minister is reproduced in which he expressed the Government's intention to ratify the Placing of Seamen Convention, 1920, only so far as the subject-matter lay within the Commonwealth's competence.

<sup>3</sup> This problem is not much clarified by the Advisory Opinion of the International Court of Justice on the *Genocide Convention*: *I.C.J. Reports*, 1951, p. 15.

<sup>4</sup> (1936), 55 C.L.R. 608.

<sup>5</sup> See Berriedale Keith, *Constitution, Administration, and Laws of the Empire* (1924), p. 229; *idem*, *Responsible Government in the Dominions* (2nd ed., 1928), vol. ii, pp. 620-1.

But an Order in Council in 1920 rejected this thesis and asserted that the obligations under the Treaty of Versailles were met if the draft Conventions and Recommendations were placed before competent authorities either in the Provinces or in the Dominion.<sup>1</sup> The opinion of the Minister of Justice was taken as competent, and the acts of the International Labour Conference were referred to the Dominion or provincial authorities as he suggested. But the feeling of the House of Commons was that an advisory opinion should be secured from the Supreme Court of Canada on the question of competence. This opinion was delivered in 1925.<sup>2</sup> It confirmed the Order in Council of 1920, holding that the treaty obligations might be met by referring the Conventions and Recommendations either to the provincial or to the Dominion authorities. But it was inevitable, considering the view prevailing in Canada, that most of the Conventions would fall to the jurisdiction of the Provinces. Of the twenty Conventions adopted by the Conference by the end of 1925, only eight fell within the jurisdiction of the Federal Parliament.<sup>3</sup> It was not until 1926 that Canada communicated its first ratification. With regard to Conventions falling within provincial jurisdiction, Canadian opinion seemed inclined to the view that even if there were uniform legislation in all the Provinces, ratification would be impossible since the Provinces would have to agree to maintain their legislation during the period the Convention was to have effect.

If there were ever any doubt that Canada is a federal State 'the power of which to enter into conventions on labour matters is subject to limitations', this doubt seemed dispelled by the Privy Council decision in the *Labour Conventions* case.<sup>4</sup> Yet it is remarkable that Canada has never officially invoked the privilege of the federal State clause. That is to say, Canada has never explicitly treated any Draft Convention as a Recommendation.<sup>5</sup> Since Recommendations, like unratified Conventions, can be ignored after being sent to 'the authority or authorities within whose competence the matter lies', no express discrimination between Conventions and Recommendations has had to be made.

Thus in the United States the Conventions and Recommendations adopted since 1934 (when the United States joined) have been submitted by the President to both Houses of Congress (all the acts of the 19th and 20th sessions of the Conference) or to the Senate alone (all the acts of the 21st and 22nd sessions—all relating to maritime labour) without any *express* indication that any of the Conventions were to be treated as Recommenda-

<sup>1</sup> Stewart, *Canadian Labour Laws and the Treaty* (1926), pp. 47-54.

<sup>2</sup> *In the Matter of Legislative Jurisdiction over Hours of Labour* (1925), S.C.R. 505.

<sup>3</sup> See Després, *Le Canada et L'Organisation Internationale du Travail* (1947), pp. 108-111.

<sup>4</sup> *A.G. for Canada v. A.G. for Ontario*, [1937] A.C. 326. The finding in this case was that in so far as Labour Conventions dealt with provincial classes of subject-matter, they could be implemented only by provincial legislative action.

<sup>5</sup> See Order in Council, P.C. 3671, 24 May 1945, in *Labour Gazette*, 45 (1945), p. 800.



tions. Regarding the maritime acts, the President requested the Senate's advice and consent to ratification of the six Conventions and 'appropriate action . . . by the Senate, in conjunction with the House' to carry out the Recommendations. Of the acts of the 23rd session, the President sent one Convention (on hours of work in the textile industry) to the Senate without request and the other Conventions and Recommendations to both Houses. The only act of the 24th session, a Convention on labour statistics, the President sent to the Senate without request. The Conventions and Recommendations of the 25th and 26th sessions he sent to both Houses. The only action taken by either House is (a) the Senate's consent to ratification of seven of the Conventions, and (b) the enactment of two laws to carry out the Convention on minimum professional capacity for masters and officers of merchant ships.<sup>1</sup> All of the seven Conventions ratified by the United States were clearly within normal federal legislative jurisdiction. But as to the rest, the United States has never explicitly invoked the federal State clause.

One final word may be said about the fifth main federation, India. From the point of view of its membership in the International Labour Organization, India had from the beginning occupied a unique position, resembling somewhat that of a federal State 'the power of which to enter into conventions on labour matters is subject to limitations'. In 1927 Lord Birkenhead, as Secretary of State for India, made it clear that if obligations arising out of draft Conventions were not limited to British India, 'the only course open to the Government of India would be to refuse consistently to ratify all Draft Conventions—a course which they would be most reluctant to adopt'.<sup>2</sup> Despite the fact that it was all of India, not merely British India, which was a Member of the I.L.O., Lord Birkenhead declared that 'the Government of India cannot undertake the obligation to make effective in the Indian States the provisions of a Draft Convention, and it follows, therefore, that a Draft Convention can be ratified by India only in the sense that the obligations are accepted as applying to British India'.<sup>3</sup>

Commenting on this position, Mr. C. Wilfred Jenks said:

'Certainly it has not been customary here [in the International Labour Organization] to regard India as being in any true sense a Federal Member of the Organisation; and the basis upon which no objection was taken to Lord Birkenhead's letter . . . was not that India was entitled to any special treatment as a Federal country but simply that the position of the Indian States was so unique that it was necessary to deal with it as a highly special case regarded as being outside the scope of all ordinary rules. I seem to remember that the Government of India said that they would refer Conventions to the States on the analogy of the Federal States clause of the Constitution of the

<sup>1</sup> 53 U.S. Stat. 554, 46 U.S. Code § 241 (1940); and 53 U.S. Stat. 1049, 46 U.S. Code § 224 a (1940). Dept. of State, *Treaties Submitted to the Senate, 1935-1944* (1945), pp. 23-27.

<sup>2</sup> I.L.O., *Official Bulletin*, 12 (1927), No. 4, p. 172.

<sup>3</sup> *Ibid.*, p. 173.

Organisation, but I do not think they have ever suggested, or could properly suggest, that the clause has any direct application.'<sup>1</sup>

Although the position of India was regarded as analogous to that of a federal Member of the I.L.O., its political structure was such that the federal State question involved in implementing Labour Conventions did not arise in the same form as in Canada and Australia. Under the Government of India Act, 1935, the inability of the Government of India to undertake the obligation to make Labour Conventions effective in the States was, however, clearly admitted. This would seem to be a situation *par excellence* calling for the application of the federal State clause; yet it was apparently never officially invoked. The situation under the Indian Constitution of 1950 is quite different, for the Indian Federal Government now has the right to trench upon State subjects in the exercise of its treaty-implementing power, not only with respect to Draft Conventions but with respect to Recommendations as well.

We return finally to the question of what is a federation 'the power of which to enter into conventions on labour matters is subject to limitations', so that its obligation with respect to such Conventions is not that of ratification but of reference to the constituent units. Even if we ignore the drafting mistake and assume that 'enter into' means 'implement', there remains another problem which was never fully considered by the pre-war I.L.O. The fact that by virtue of having ratified an International Labour Convention a federation might be held to possess the power to enact labour legislation which would otherwise be *ultra vires* was apparently overlooked even by the Committee of Experts on the Application of Conventions. The Committee of Experts, with Lord (then Mr. Arnold) McNair as its Rapporteur, in its report of 10 April 1937 to the Governing Body of the I.L.O., severely condemned the practice adopted by certain States 'of ratifying Conventions in advance of their ability to give internal effect to them and in the hope of being able to do so at an early date'.<sup>2</sup> In assuming this position, the Committee of Experts may have been unmindful of the possibility that a federal Government by the very act of ratifying Conventions may confer upon its legislature the authority to give internal effect to the Conventions so ratified. It is possible, however, that the report was not framed with reference to the federal Members of the I.L.O. but rather had reference to certain other Members of the Organization who had failed to apply Conventions ratified by them. The question of enlargement of federal power by ratification did not loom large until the drafting of the Montreal Amendments in 1946.

<sup>1</sup> Quoted in Stewart, *Treaty Relations of the British Commonwealth* (1939), p. 323.

<sup>2</sup> International Labour Conference, 23rd session, 1937, *Summary of Annual Reports under Article 22 of the International Labour Organisation*, Appendix, Report of the Committee of Experts on the Application of Conventions.



*The Montreal Amendments*

The Montreal Amendments grew out of the demand by Member States to improve the effectiveness of the system of Conventions and Recommendations, as provided for in the Constitution of the I.L.O. Stimulated by the proposed merger with the United Nations, by the end of hostilities, and by the impetus provided by popular opinion for better international collaboration, the whole question was discussed at length at the Paris General Conference in 1946. It was resolved that 'certain obligations of states in respect of conventions and recommendations as well as certain aspects of constitutional practice of the Organisation in this regard, must be clarified and amplified in order to assure the working of the Organisation with increased efficiency'.<sup>1</sup>

It was clear from the Report of the Paris Conference Delegation that an amendment of the original federal State clause was called for. The Report stressed the fact that in the early stage of the existence of the Organization its social legislation was of a moderate character, and that in consequence the more favourable position of federal States did not provoke adverse criticism from the unitary States. But by 1946 the position had changed. The scope of social, economic, and, in many cases, cultural legislation had become broader and more comprehensive. It was desired to cover many new fields of economic activity, in which it would be detrimental to the interests of certain States to have other, competitive, States not in the same position. Unitary States were beginning to feel that their interests were being adversely affected by the ratification of such higher-requirement Conventions and felt hesitant about ratifying when federal States were not obligated by comparable commitments. Another reason for this change of attitude was the voting procedure. In the voting which determines whether the Convention has the necessary two-thirds majority, the votes of all delegates of the Organization are of equal value, whether the Member is a federal or unitary State. This was felt to be contrary to the spirit of equality of obligation and voting power. Unitary States felt that with regard to future Conventions they might be forced to consider, in addition to the actual merits or demerits of the particular draft proposal, the inequality of the rights and obligations resulting from its adoption. Another reason advanced for modifying the concessions to federal States was that the number of ratifications deposited did not truly reflect the constitutional position of these States in labour matters.

The whole question was referred to the Conference Delegation on Constitutional Questions. At its first session, held in London from 21 January to

<sup>1</sup> International Labour Organization, *Report of the Conference Delegation on Constitutional Questions on the Work of its First Session, 21 January-15 February 1946*, ch. 4.

15 February 1946, the Delegation decided to invite the various federal Governments to designate representatives to attend its second session, due to be held in Montreal from 14 to 29 May. The Member States invited were Argentina, Australia, Brazil, Canada, India, Mexico, Switzerland, the United States, and Yugoslavia; and of these the Governments of Australia, Canada, India, and the United States accepted.<sup>1</sup> The draft which finally emerged was jointly sponsored by Australia, Canada, and the United States, and agreed to by Switzerland.

In the deliberations of the second session<sup>2</sup> five different proposals or possibilities were considered. Each of these purported to be designed to reduce the disparity in obligations between federal and unitary States.

(1) The first possibility was simply to delete Article 19 (9) of the existing Constitution permitting federal States to deal with Conventions as if they were Recommendations. The deletion of this provision without the inclusion of any alternative provision in the amended Constitution would, however, have had serious disadvantages. It was unacceptable to the federal States, and hence would be unlikely to result in any material increase in the number of ratifications by these States. It would have left the basic problem unsolved. It would have relieved the federal States of their existing obligation to treat Conventions to which constitutional limitations apply as Recommendations, and yet not have clarified their new obligations as to Conventions.

(2) The second possibility was to delete from the Constitution all reference to Conventions and to make Recommendations the sole instrument for achieving the legislative objects of the Organization. It was contended during the discussion that the virtue of this solution was that it would link equality of voting with equality of obligation. It was assumed that this solution would be acceptable to federal State Members, since they would not wish to impose on unitary States more obligations than membership of the Organization entailed for themselves. This solution would have been a revolutionary one, however, and would have involved a basic contraction in the ambition and scope of the I.L.O. It would have reduced the obligation of all Member States to that of those federal States which had constitutional limitations on their ability to effect labour legislation. This would be parity, but bought too dearly.

(3) The third possibility was that a Convention should be dealt with by each of the component States in a federal State in the same way as it is dealt with by unitary States. In other words, the ratification process would be vested in the component States of the Federation. But this proposal

<sup>1</sup> Australia was represented by Mr. K. H. Bailey, the Solicitor-General. Apparently the only other legal luminary present was Mr. C. Wilfred Jenks, the I.L.O. Legal Adviser.

<sup>2</sup> *Report of the Conference Delegation on Constitutional Questions*, Second Session, 1946.



would have even more radical implications as to the conduct of foreign relations by federal States. It would, for example, by implying the international personality of the constituent units, reopen the whole question of representation of those units in the I.L.O. Conference.<sup>1</sup> Yet the Constitutions of all federal States either prohibit the constituent units from entering into international engagements or so limit their power to do so as to make the power inoperative in practice. Accordingly, all the representatives of federal States made it clear that this suggestion was wholly unacceptable to them on major grounds of national policy.

(4) The fourth possibility was the proposal originally put forward for discussion by the American representative.<sup>2</sup> This proposal would have left the original Article 19 (9) substantially unaltered except for the substitution of the phrase 'to give effect to Conventions' for the original phrase 'to enter into Conventions'. Thus the federal State clause would be made to read:

'...'

'(b) In the case of Federal States the power of which to give effect to Conventions and Recommendations on labour matters is limited, and where the competent legislatures are those of the federal States or provinces, the Governments of the federal States concerned should. . . .'<sup>3</sup>

This clause would have amalgamated the treatment of Conventions and Recommendations, rendering the obligation of a federal State the same with respect to both, where that federal State is subject to limitations. But it re-defines the limitations as those relating to 'performance' rather than 'capacity'. This is a mere drafting revision and was designed to carry out the obvious intent of the original drafters in 1919. Read literally, the language of the original federal State clause applied to no Member State, for no Federation—not even Canada<sup>4</sup>—is by reason of federalism subject to

<sup>1</sup> The membership of the Ukraine and Byelorussia in the United Nations was hardly a reassuring precedent. Nevertheless, a new standing order of the I.L.O. makes it possible for constituent units (States, provinces, or cantons) to be represented at its conferences.

<sup>2</sup> *Second Report of Conference Delegation on Constitutional Questions*, paragraph 15.

<sup>3</sup> '(i) make (where necessary subject to the concurrence of the State or provincial Government concerned) effective arrangements for the reference of Conventions and Recommendations to which such limitations apply to the legislative authorities of those States or provinces with a view to appropriate action being taken to give effect to such Conventions and Recommendations;

'(ii) arrange (subject to the concurrence of the State or provincial Government concerned) for periodical consultations between the federal and the State or provincial authorities, in which representatives of the employers' and workers' organisations should participate in an appropriate manner, with a view to promoting co-ordinated action to give effect to the provisions of Conventions and Recommendations to which such limitations apply; and

'(iii) make regular reports to the Director of the International Labour Office as requested by the Governing Body, concerning the action taken by the federated States and provinces to give effect to the provisions of Conventions and Recommendations to which such limitations apply. . . .'

<sup>4</sup> The reasoning of Justices Rinfret and Crocket in the *Labour Conventions* case (1936), S.C.R. 461, at pp. 513 and 538, that the International Labour Conventions could not constitutionally be ratified (without the consent of the legislature in each of the Provinces) was apparently rejected by the Privy Council: [1937] A.C. 326.

constitutional limitations on the power to *make* ('enter into') treaties on labour matters. The American draft was aimed simply at correcting this initial drafting *faux pas*.

The trouble with the American draft, however, was that it was inappropriate to the American (and Australian) constitutional situation. It fitted the Canadian situation perfectly. Canada is a Federation the power of which to implement ('give effect to') treaties is clearly subject to constitutional limitations by virtue of the Dominion/provincial division of powers. But this is certainly not true of the United States. For *Missouri v. Holland* expressly held that 'If the treaty is valid [as to 'capacity' limitations], there can be no dispute about the validity of the statute under [the United States Constitution] Article I, section 8, as a necessary and proper means to give effect to it'.<sup>1</sup> The federal/State distribution of powers set forth in the Constitution of the United States is not an obstacle to treaty implementation, since the treaty-making and the treaty-implementing powers are co-extensive and alike vested in the federal Government. The same is true in Australia.<sup>2</sup> If the American delegation had contained a lawyer of the ability of the Australian Solicitor-General, the original American proposal would probably not have been put forth in these terms. At any rate, as the result of discussion with the Australian and other federal representatives, the American proposal was soon dropped in favour of the final compromise draft.

(5) The final compromise draft sought to avoid the pitfalls of the previous four proposals and to meet the requirements of flexibility and general acceptability. In the light of these considerations, the Delegation proposed the substitution, for paragraph 9 of the old text of Article 19, of the following provision, which was ultimately inserted in the amended text of Article 19 as paragraph 7.

'7. In the case of a federal State, the provisions of this article shall apply subject to the following modifications:

- '(a) In respect of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of Members which are not federal States;
- '(b) In respect of Conventions and Recommendations which the federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal Government shall. . . .'<sup>3</sup>

Like the original American draft proposal, this clause amalgamates the

<sup>1</sup> (1920), 252 U.S. 416, at p. 432.

<sup>2</sup> See *R. v. Burgess, ex parte Henry* (1936), 55 C.L.R. 618.

<sup>3</sup> (i) make, in accordance with its Constitution and the Constitutions of the States or provinces concerned, effective arrangements for the reference of such Conventions and Recommendations not later than eighteen months from the closing of the session of the Conference to the appropriate authorities of the States or provinces for the enactment of legislation or other action;

(ii) arrange, subject to the concurrence of the State or provincial Governments concerned, for



treatment of Conventions and Recommendations, rendering the obligation of a federal State the same with respect to both where a constitutional difficulty applies. The main change in the new federal State clause is that a new test is to be applied to ascertain when a difficulty arises. The amended clause speaks not of limitation, but of appropriateness. A discretion is allowed to the federal State, since federal action need only be taken when the federal Government regards the Convention or Recommendation as 'appropriate for federal action'. Appropriateness may involve, presumably, questions of policy and propriety as well as power. At any rate the test is to be a subjective one, whereas the old test of 'power . . . subject to limitations' was at least couched in objective form.<sup>1</sup>

The difference in the effect of the old and new federal State clauses is best illustrated by the Swiss constitutional position. The Swiss Federal Government has the constitutional power to implement treaties involving matters normally within cantonal legislative competence. 'The formal limitations on the Confederation's right to legislate, as imposed by the Federal Constitution, do not apply in the case of international agreements. . . . It can conclude treaties with foreign powers even on subjects which, by the terms of the Constitution, do not fall within its legislative competence.'<sup>2</sup> The Swiss Government, while conceding its power thus to trench on cantonal subjects, has nevertheless consistently denied the constitutional propriety of doing so in certain circumstances. Here is an inhibition upon federal action, not of power but of propriety. The Swiss Government simply does not regard the implementation of certain treaties as 'appropriate under its constitutional system for federal action'. This is a case

periodical consultations between the federal and the State or provincial authorities with a view to promoting within the federal State co-ordinated action to give effect to the provisions of such Conventions and Recommendations;

'(iii) inform the Director of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate authorities of its constituent States or provinces with particulars of the authorities regarded as appropriate and of the action taken by them;

'(iv) in respect of each such Convention which it has not ratified, report to the Director of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;

'(v) in respect of each such Recommendation, report to the Director of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the various States or provinces in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.'

<sup>1</sup> Of course, even a test couched in objective form may depend on the subjective determination of the individual State. Presumably only the federal Government itself can authoritatively determine whether its power 'to enter into Conventions on labour matters is subject to limitations'. Yet the Director General of the I.L.O. has on occasion challenged this determination, as in the case of Switzerland and Germany in 1925, thereby asserting that the standard is an objective one.

<sup>2</sup> Statement of the Federal Council, 1920.

in which the new federal State clause would sanction federal abstinence where the old clause would not.<sup>1</sup>

What has been said is enough to cast serious doubt upon the statement of the 1946 Conference Delegation on Constitutional Questions that 'this difference [between federal and unitary States] will be reduced but not eliminated' by the new clause.<sup>2</sup> If anything, the new federal State clause appears to widen the disparity of obligation between federal and unitary States. By substituting a test of appropriateness for that of limitations on power, and by couching this test in subjective rather than objective terms, the obligation of federal States is actually diminished. Particularly is this true of States like Australia and the United States, where the federal Government is under no constitutional inhibitions in treaty implementation resulting from the federal/State distribution of power, but may be under considerable political inhibitions.

It was therefore perhaps with unconscious irony that in the concluding statement of the 1946 Report the Conference Delegation expressed its hope that the new federal State clause 'may mark the opening of a new period in the relationships between the International Labour Organisation and the federal States'.<sup>3</sup> Since 1948, when the Montreal Amendments took effect, it is probably fair to say that the record of ratifications of I.L.O. Conventions by federal States has not been materially better or worse than the pre-war record. Federal States have never been good ratifiers of I.L.O. Conventions.<sup>4</sup> Although the privilege afforded to the federal States was directly due to the American constitutional situation, the United States did not even join the Organization until 1934, and has since ratified only seven of the 103 Conventions adopted by the Conferences up to 1955. Canada and Australia have a little better record, with eighteen ratifications each. Switzerland has ratified twenty Conventions. Mexico is the only federal State which has ratified more than one-third of the Conventions. But Mexico is not a federal State in labour matters; nor is Yugoslavia, which, of the federal States, is next in line. In Germany's semi-federal days before 1933 she ratified seventeen Conventions. The U.S.S.R., which purports to have a federal Constitution, was a member of the I.L.O. from 1934 to 1939 and has again recently rejoined. Her total is zero. These figures are not an impressive showing.<sup>5</sup>

<sup>1</sup> Thus the action of Switzerland in 1925 by which it invoked the federal State clause with respect to the Weekly Rest Convention would be legitimate under the new federal State clause although not under the old.

<sup>2</sup> *Report of the Conference Delegation on Constitutional Questions*, Second Session, 1946, paragraph 11.

<sup>3</sup> *Ibid.*, paragraph 17.

<sup>4</sup> See I.L.O., *Official Chart of Ratifications of International Labour Conventions to June 1, 1955*, from which the following figures are taken.

<sup>5</sup> Compared with unitary States, federal States have not only been parsimonious, but also dilatory, in their ratifications.



Of course it is often pointed out that the figures of ratifications of Conventions do not truly reflect the real position of federal States in labour matters. Certainly the four 'classic' federations—the United States, Canada, Australia, and Switzerland—have standards equal to or higher than those laid down in the Conventions.<sup>1</sup> But in drawing attention to the figures one can only state that, in the absence of ratification, there is no machinery by which these standards can be measured or verified for purposes of international comparison.

Stress should be laid on the great differences which exist between different federal States as regards the size of their population, the degree of industrial development, the degree of centralization of power, the number of authorities exercising jurisdiction, and the nature of the relations between the central authority and the constituent units. Despite these differences it is safe to say that most constitutional difficulties in ratification could be overcome by active federal/State co-operation. Yet in all the federal States, little has been done by this method, although Australia has called several inconclusive conferences for this purpose.<sup>2</sup> The advanced Federations have every reason to realize the importance which should be attached to ratification of the Conventions adopted by the Conference. Ratification removes the hesitation of other States to adhere to Conventions, and assists the fulfilment of the Organization's main objective, which is to prevent competitive nationalism from impeding the establishing in all countries of humane labour conditions. Any action taken to increase the standards of other competitive countries must be of benefit to the Federation concerned.<sup>3</sup> This is the practical advantage of reducing both the political and the possible

<sup>1</sup> The same argument applies with respect to the proposed Draft Covenants on Human Rights.

<sup>2</sup> Staricoff, 'Australia and the Constitution of the International Labour Organisation', in *International Labour Review*, 32 (1935), p. 577. Generally, co-operation has not met with much success in the federal States. In Canada, although numerous boards and commissions have been set up, their records of accomplishment have not been good. Professor James A. Corry finds co-operation clumsy, expensive, and restricted by constitutional difficulties of administration. See *Report of the Royal Commission on Dominion-Provincial Relations* (1939), 'Difficulties of Divided Jurisdiction', Appendix 7. In Australia, much more has been done by means of grants, Premiers' Conferences, inter-State agreements, and complementary legislation, but Greenwood, *The Future of Australian Federalism* (1946), p. 301, concludes: 'Cooperation as a technique for securing uniform action upon urgent but highly contentious social, economic and governmental problems has been shown by the Australian experience to be lethargic, complicated and for the most part ineffective.' For the United States, a brighter picture is painted by Koenig, 'Federal and State Cooperation under the Federal Constitution', in *Michigan Law Review*, 36 (1938), p. 752. He says that co-operation 'promises to become an acceptable alternative to a highly centralized government with the states as merely passive units'.

<sup>3</sup> The Minister for External Affairs in Australia once indicated in a statement that he was not unmindful of these considerations. 'We have to remember that, industrially, Australia is in the vanguard of nations. Our workers enjoy a higher standard than those of almost any other country. This means that, in international trade, countries having a lower standard of wages and conditions for their workers are able more effectively to compete with Australia. From this it follows that any action taken to increase the standards of living in other countries which are in competition with us must be of material benefit to the Commonwealth.' *Commonwealth Parliamentary Debates*, 12 December 1934.

legal difficulties which may present a bar to ratification of a Convention by countries with higher standards than those required by the Convention.

## II. *The United Nations and human rights*

'What the United Nations is trying to do', wrote the Director of its Division of Human Rights in 1948, 'is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of supernational supervision of this relationship between the state and its citizens.'<sup>1</sup> The terming of the project as 'revolutionary' should not, however, obscure one basic fact. The idea of supra-national supervision of the relationship of a State to its own citizens—which is the real crux of the matter—revolutionary as it may appear, is not without precedent: witness the activities of the League of Nations in the field of general protection of minorities within the framework of the peace treaties concluded at the end of the First World War; of the Upper Silesian minorities protection under the Geneva Convention of 1922; and of the supervision of the administration of mandated areas. What is revolutionary is the scope of the project conceived by the United Nations, and the emphasis it has received.

The attempt to draft an international code of human rights is the most significant post-war development in international law. It is also the most significant contribution of the United Nations to international law. It is almost true to say that the United Nations has become fundamentally oriented around the human rights question. In the United Nations Charter itself, Articles 55 and 56 pledged the Member States to take joint and separate action for the promotion of basic human rights and fundamental freedoms, leaving these undefined. The General Assembly in 1948 adopted a Universal Declaration of Human Rights which spelled out these freedoms in great detail and gave the conception of human rights a very wide content, including not only traditional civil liberties, but also economic, social, and cultural rights. This Declaration, however, had no binding legal force on the Member States; it was purely hortatory and not mandatory. It was intended as nothing more than the enunciation of a standard. Accordingly, the leading federal States found no difficulty in supporting the Declaration.

The real difficulty came when it was proposed to incorporate the rights in the Declaration in a binding Covenant of Human Rights. This Covenant was to constitute a multilateral treaty binding on all signatory States. The

<sup>1</sup> John P. Humphrey, Director of the Division of Human Rights of the United Nations Secretariat, in *Annals of the American Academy of Political and Social Science*, January 1948.



rights to be included therein were much more extensive than those in the American Bill of Rights and were not only to include protection against official action, but were also to extend to private action as well. No modification of this basic conception was intended by the General Assembly when, at its sixth session in 1952, it resolved that two Covenants on Human Rights should be drafted, one relating to civil and political rights, the other to economic, social and cultural rights. The Resolution expressly provided that the two Drafts should be submitted simultaneously to the General Assembly and should contain as many similar provisions as possible 'in order to emphasize the unity of the aim in view'. The Covenant on economic, social and cultural rights will cover the whole field of labour questions and social policy which for more than thirty years have been the field of activity of the International Labour Organization. It will also extend its scope considerably further so as to include the fields of education and health.<sup>1</sup>

The peculiar problem of federal States, as previously pointed out, relates to those subject-matters which fall outside the competence of federal legislative organs. To the extent that human rights belong to the field of federal powers, there is no problem; the federal State is in these circumstances in exactly the same position as a unitary State. Although the Constitutions of some Federations—notably the United States of America—secure certain individual rights against Government action, it is doubtful whether much of the contents of the proposed Covenants fall within federal jurisdiction except in the highly centralized quasi-federal States of Latin-America.<sup>2</sup> It therefore seems clear that many of the matters dealt with in the Draft Covenants are not within traditional limits of federal legislation, but fall within the legislative competence of the constituent States. Particularly is this true with regard to economic, social, and cultural rights, and most clearly so when infringement is due to private (as opposed to Government) action. Thus the question has arisen whether a federal Government, because of such limitations on its legislative powers, is thereby debarred from undertaking obligations in these matters, or whether, on the other hand, measures can be adopted with a view to allowing federal Governments to play an active part in bringing these matters under international control.

<sup>1</sup> The Commission on Human Rights during its tenth session drafted a final text regarding these matters, embodied in its *Report*: U.N. Doc. E/CN.4/L.366.

<sup>2</sup> The representatives of Brazil and Mexico to the Fifth General Assembly stated without reservation that as far as their countries were concerned the question of human rights was within the competence of federal authorities: U.N. General Assembly, 5th Session, *Official Records*, Third Committee, p. 139 (Mexico) and p. 143 (Brazil). The representative of the United States asserted that the Federal Government had jurisdiction with regard to most of the matters covered by the Draft, but at that time the Draft comprised only civil rights, to the exclusion of economic and social rights. See United Nations General Assembly, 5th Session, *Official Records*, Third Committee, p. 145.

In this new field of international legislation federal States have expressed their desire to be able to ratify conventions, although they may not be in a position to give full effect to their provisions. Ratification as such is considered as a symbolic act which proves the readiness of the ratifying Government to co-operate with other Governments for attaining specific objects. Furthermore, only by becoming a party to a convention through ratification will a federal Government be entitled to whatever rights the convention provides, such as the right to complain against other parties for not observing the rules laid down by the convention. Finally, ratification is not without a certain propaganda value. For these reasons representatives of federal States have proposed that the future Covenants on Human Rights should contain a clause allowing them to ratify the Covenants, although they could not undertake to give effect to those provisions which call for action by the constituent States. Various formulas have been suggested, the common feature of which is that ratification by federal States will not constitute a legal obligation to observe the convention, in so far as its provisions fall under the reserved powers of the constituent States.

#### *Early discussion of the federal State problem*

The first proposal for the inclusion of a federal State clause in the Draft Covenants was made by the United States and Australia. This clause was to read:

'In the case of a federal State, the following provisions shall apply:

'(a) With respect to any articles of this Covenant which the federal government regards as wholly or in part appropriate for federal action, the obligations of the federal government shall, to this extent, be the same as those of Parties which are not federal states;

'(b) In respect of articles which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons, the federal government shall bring such provisions, with favourable recommendation, to the notice of the appropriate authorities of the states, provinces or cantons at the earliest possible moment.'

In using the test of 'appropriateness', this text followed closely that contained in the Constitution of the International Labour Organization. It was felt by the United States and Australia that this formula had resulted from long and expert consultations and had already secured a wide measure of agreement. Against this wording, however, it was objected that it left too wide a measure of discretion to the federal Government itself, without allowing other Governments to call in question the correctness of the decision reached by the federal Government. To meet this objection the delegate of India submitted a proposal according to which the words 'which

<sup>1</sup> Economic and Social Council, *Official Records*, 6th Session, Supp. No. 1 (U.N. Doc. E/600): Commission on Human Rights, *Report of the Second Session*, p. 29.



the federal government regards as wholly or in part appropriate for federal action' should be replaced by 'the implementation of which is under the constitution of the federal state, wholly or in part, within the jurisdiction of the constituent units'.<sup>1</sup> It was thus intended that the construction and application of the relevant provisions of the federal Constitution would be subject to the control of other contracting parties as part of their general right to supervise the application of the convention. The United States was not able to accept this wording, but modified its original proposal to read '... articles which are determined in accordance with the constitutional processes of that state to be appropriate, in whole or in part, for action by the constituent states ...'.<sup>2</sup>

The implication of this amended text seemed to be merely that it is not necessarily the executive branch of the federal Government which is the sole authority for interpreting the federal Constitution. In federations where there is judicial review of constitutional limitations, the judiciary will ultimately determine the scope of international obligations assumed by the federal State. Under this formula, however, it is still left to a single contracting party to determine, by one organ or the other, the extent of its own obligations. But the difference between the original and the amended text is not great. For where internal constitutional limitations are doubtful in scope, it is hardly open to other contracting parties to dispute the correctness of an interpretation given to a national Constitution by a competent organ acting in good faith. In form, however, this amended clause was stricter than the corresponding provision of the new I.L.O. Constitution, which merely used the words 'conventions ... which the federal government regards as appropriate'.

It remained true, nevertheless, that under this text other contracting parties would be left in ignorance about the obligations of a federal State and thus also about their own rights in relation to such a State. Accordingly, at the fifth session of the Commission on Human Rights the United Kingdom proposed an amendment to meet this difficulty. This was an additional paragraph to the effect that a federal State party to the Covenant should, at the request of another party, report what effect had been given to the provisions of the Covenant by the Governments of the constituent States following the recommendations made by the federal Government.<sup>3</sup> The scope of this proposal was explained in narrow terms by the United Kingdom delegate at the Fifth General Assembly, when he stated that it

<sup>1</sup> *Official Records*, 9th Session, Supp. No. 10 (U.N. Doc. E/1371): *Report of the Fifth Session of the Commission on Human Rights*, p. 26.

<sup>2</sup> *Ibid.*, 11th Session, Supp. No. 5 (U.N. Doc. E/1681), *Report of the Sixth Session*, p. 21.

<sup>3</sup> *Ibid.*, *Report of the Fifth Session* (Doc. E/1371), p. 26. At the United Nations Conference on the Status of Refugees a similar provision was adopted upon the proposal of the representative of the United Kingdom (A/Conf.2/97). See Article 41 (c) of the Convention of 28 July 1951 Relating to the Status of Refugees.

was not envisaged that a request of this kind would be presented unless a party to the Covenant had reason to believe that a federal State was seeking to evade its obligations by invoking a provision of its own Constitution.<sup>1</sup>

Understood in this limited sense, the proposal would not give other States the knowledge to which they are legitimately entitled in all circumstances, even when the federal State is not attempting to evade its obligations. Another British proposal, presented at the sixth session of the Commission on Human Rights, went somewhat farther. It provided that the federal State 'inform the Secretary-General of the United Nations when the laws of any constituent state, province or canton give effect fully to the provisions of the Covenant which lie within its jurisdictional sphere'.<sup>2</sup> The defect of this proposal is that information is only to be supplied at the moment when full effect is given to the provisions of the Covenant. Prior to that no information is required, and other contracting States will, in particular, lack official knowledge about the basic point, namely, which provisions fall within the reserved powers of the constituent States.

It was clear from the early discussions in the Human Rights Commission that Britain and France would support the federal State clause agreed to in principle by the United States, Australia, and India. The reason for this was not any broad sympathy for the constitutional difficulties of the federal States. Rather Britain and France felt that the fate of the federal State clause was inextricably linked with that of the 'colonial clause', inasmuch as both clauses involved the same principle of limitation of obligation.<sup>3</sup> The problem of federal States was felt to be akin to that of metropolitan States with dependent overseas territories.<sup>4</sup>

Several other countries, however, took a hostile position in regard to the federal State clause. The feeling was evident among many representatives in the Commission that federal Governments, like other Governments, must solve their own internal difficulties. In the sixth session of the Commission on Human Rights the representative of Yugoslavia, which itself purports to be a federal State, proposed the following clause as part of the Draft Covenant:

'No federal state shall ratify the present Covenant unless it has previously ensured the application thereof throughout its territory.'<sup>5</sup>

<sup>1</sup> General Assembly, 5th Session, *Official Records*, Third Committee, p. 137.

<sup>2</sup> Commission on Human Rights, *Report of the Sixth Session*, p. 21.

<sup>3</sup> See Liang, 'Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments', in *American Journal of International Law*, 45 (1951), p. 108.

<sup>4</sup> 'His Majesty's Government will support the inclusion in the Covenant of articles intended to make suitable provision for the particular constitutional circumstances of federal states or of metropolitan states with dependent overseas territories.' Commission on Human Rights, *Report of the Seventh Session* (Doc. E/1992), p. 39.

<sup>5</sup> Commission on Human Rights, *Report of the Sixth Session* (U.N. Doc. E/1687), Annex I, p. 21.



The objection raised by other federal States to the Yugoslav proposal is this: Even if the necessary legislation might be enacted in all constituent States or Provinces—which is most unlikely to happen—the federal Government is unable to ensure that State or Provincial Governments will not modify such legislation in contravention of the Treaty. The federal Government has no constitutional power to prevent such legislation and cannot therefore undertake any obligation to maintain the State or Provincial legislation once enacted.<sup>1</sup>

The trouble with this argument is that it proves too much. In the first place, unitary States face a similar difficulty, since the treaty-making branch of the Government may be unable to prevent the legislature from repealing previously enacted legislation. In the second place, the argument applies equally well to customary international law. It is always open to a State or Provincial legislature to enact legislation in violation of the rules of customary international law, no less than of treaty law, and it is firmly established that the federal Government can be held internationally responsible for this breach.<sup>2</sup> It cannot plead a constitutional incapacity to secure compliance from its constituent units. No one would argue that a federal Government could for that reason reject the obligations imposed by customary international law and yet the argument against undertaking treaty obligations seems to be basically the same and equally weak.

The real objection on the part of the main Federations to the proposal of Yugoslavia is that it does not, like the other proposals, allow federal States a different status from unitary States under particular treaties, that is to say, allow them to become parties to a treaty without having the same obligations as other contracting parties. The main Federations have consistently maintained that if the only choice presented to them is between accepting the Covenants as a whole or not accepting any part of them, they will decline acceptance for constitutional or political reasons. This is highly unsatisfactory from an international point of view, and it may be considered a lesser evil to allow federal States to become parties to the Covenants in respect of those provisions only to which effect can be given by the federal Government itself.<sup>3</sup>

On the other hand, throughout the deliberations of the Human Rights Commission a number of representatives expressed themselves vehemently against the inclusion of a federal State clause. The representatives of the

<sup>1</sup> Representative of Canada, U.N. General Assembly, 5th Session, *Official Records*, Third Committee, p. 136.

<sup>2</sup> Oppenheim, *International Law*, vol. i (8th ed. by Lauterpacht, 1955), § 89; Hyde, *International Law*, vol. ii (2nd ed., 1945), p. 949; Hackworth, *Digest of International Law*, vol. v (1941), pp. 593–7; Guggenheim, *Lehrbuch des Völkerrechts*, vol. i (1938), p. 277.

<sup>3</sup> These considerations were expressed by the representative of the United States in the Fourth General Assembly during discussions relating to the Convention on the Suppression of the Traffic in Persons: *Official Records*, Sixth Committee, 201st meeting, paragraph 88.

Dominican Republic, Egypt, Iraq, and Mexico, among others, held that such a clause was out of place in covenants on human rights, the universality of which should be ensured.<sup>1</sup> The representatives of Guatemala, Syria, and Yugoslavia were of the opinion that to include a federal State article would discriminate in favour of federal States and might, on that account, discourage non-federal States from signing the Covenants.<sup>2</sup> The representatives of Egypt and Yugoslavia also expressed the view that a federal State article might be applied by metropolitan Powers to their dependent territories and that its adoption would be tantamount to an outright repeal of the article on the territorial application of the Covenants which had by then become incorporated in the Draft Covenants.<sup>3</sup> Against the threat of abstention from federal States, the general feeling of these representatives seemed to be that non-ratification by federal States was preferable to ratifications which were not given complete effect.<sup>4</sup>

This head-on clash was not resolved when the matter was debated in the Third Committee of the Fifth General Assembly. The Commission on Human Rights had not had time to resolve this impasse and the Economic and Social Council had asked the General Assembly for a political decision on the question of including such a clause in the Draft. The General Assembly in 1950 instructed the Commission on Human Rights

'to study a federal state article and to prepare, for the consideration of the General Assembly at its sixth session, recommendations which will have as their purpose the securing of the maximum extension of the Covenant to the constituent units of federal states, and the meeting of the constitutional problems of federal states'.<sup>5</sup>

This Resolution of the General Assembly indicated the desirability of not identifying the position of federal States with that of unitary States, while at the same time avoiding judgment on the feasibility of a federal State clause. But the twin directive was so inherently contradictory that to the extent that one aim was satisfied (securing the maximum extension of the Covenant to the constituent units) the other aim would be defeated (meeting the constitutional problems of federal States), and vice versa.

A way out of this impasse was suggested by Professor (now Sir Hersch) Lauterpacht in his important book, *International Law and Human Rights*,

<sup>1</sup> Commission on Human Rights, *Report of the Seventh Session* (Doc. E/1992), p. 39.

<sup>2</sup> Ibid.

<sup>3</sup> *United Nations Yearbook*, 1953, p. 385.

<sup>4</sup> Cf. the following observations of an I.L.O. Committee of Experts on the Application of Conventions: '... no ratification at all is infinitely preferable to a ratification to which effect is not given both by any necessary legislation and in practical application. An ineffective ratification not only fails to raise or stabilise labour conditions but it undermines respect for international obligations solemnly undertaken, reduces respect for international good faith, is unfair to States which respect their obligations and deters such States from undertaking further ratifications, thereby materially reducing social progress'. International Labour Conference, 31st Session, 1948, Report III, Appendix, p. 8.

<sup>5</sup> Resolution 421 (V) C, paragraph 5, of 4 December 1950, General Assembly, 5th Session, *Official Records*, Supp. No. 20 (A/1775), p. 42.



published in 1950. He suggested an unqualified Convention subject to the possibility of a reservation open to federal States permitting them to declare themselves exempted for a limited period from the obligations under the Covenant in so far as they fall within the jurisdiction of the constituent States.<sup>1</sup> This idea was taken up by the representative of Denmark at the seventh session of the Commission on Human Rights. He proposed the following Article:

'1. The government of a federal State may at the time of signature, ratification or accession to this Covenant make a reservation in respect of any particular provision of the Covenant to the extent that the application of such provision, under the constitution of the federal State, falls within the exclusive jurisdiction of the constituent states, provinces or cantons. The Secretary-General of the United Nations shall inform other States Parties to the Covenant of any such reservation.

'2. When making a reservation under paragraph 1, the government of the federal State shall transmit to the Secretary-General, for communication to other States Parties to the Covenant, a brief statement as to the status of the law of the constituent states, provinces or cantons with regard to the subjects covered by the reservation.

'3. When a reservation is made under paragraph 1, the federal government shall bring the relevant provisions of the Covenant to the attention of the appropriate authorities of the constituent states, provinces or cantons and recommend that such steps be taken as may be necessary to give full effect to the provisions.

'4. A reservation made under paragraph 1 may at any time be withdrawn in whole or in part. Withdrawal of a reservation is effected by notification to the Secretary-General, who shall inform the other States Parties to the Covenant.

'5. As long as and to the extent that a reservation made under paragraph 1 remains in force, the government of the federal State may not in relation to other States Parties to the Covenant invoke the relevant provisions of the Covenant.'<sup>2</sup>

In proposing this Article the representative of Denmark maintained the previous position of his Government that it would be preferable not to include a federal State clause in the Covenant at all. In view, however, of the General Assembly's Resolution of 1950 this proposal was submitted so that if a federal State clause were included it would be in the form of a reservations clause rather than a blanket qualification-of-obligation clause. The purpose of the reservations clause was to obviate to the greatest possible extent the disadvantages resulting from the status of inequality which a blanket clause would inevitably entail.

Specifically, the reservations clause proposed by Denmark was said to have the following advantages. (1) The federal States could ratify the Covenant even if the implementation of certain of its provisions under their constitutional systems fell within the reserved powers of their constituent units. (2) The limitation of obligations of federal States would result only from express reservations in respect of particular provisions, and not from

<sup>1</sup> See Lauterpacht, *International Law and Human Rights* (1950), p. 363.

<sup>2</sup> See U.N.Doc. E/CN.4/636.

the automatic application of a more general federal State clause. (3) Other States parties would be kept informed of the extent to which a federal State gives effect to the provisions covered by reservations. (4) A federal State which, because of a reservation, is immune from complaints regarding violations of a provision in the Covenant would not itself be able to make such complaints against other States parties.

The main advantages, then, were reciprocity and certainty. It was deemed only fair that a federal Government, to the extent that it maintained its reservation, should be debarred from invoking the relevant provisions of the Covenant against other States. Further, the reservations clause was thought to be the only way by which parties to the Covenant could be certain about their mutual rights and obligations. Admittedly, the problem of reservations to multilateral treaties is one of the most complex and baffling in international law,<sup>1</sup> and the Advisory Opinion of the International Court of Justice in the *Genocide* case<sup>2</sup> did little to clarify the matter. But whatever doubts may exist generally as to the proper rules of international law regarding reservations to multilateral instruments, there is no doubt that reservations expressly provided for in the instrument itself can be validly made.

The merits and demerits of these various proposals were debated by the Third Committee of the General Assembly at its eighth session in 1953.<sup>3</sup> Here again a number of representatives expressed themselves against the inclusion of any federal State clause. A few representatives agreed with Denmark that the constitutional difficulties of federal States might be overcome by the use of reservations at the time of signature. The federal representatives, including those of Australia, Canada, and the United States, held that to omit the federal State clause would constitute an insuperable barrier to ratification of the Covenants by federal States. The representatives of India and the United States stressed that a majority of unitary States should not attempt to force the hand of federal States which had particular constitutional difficulties.

In the face of this deadlock, a number of representatives, including those of Brazil, Cuba, and France, were of the opinion that a decision on this important question would be premature without further study. The representatives of Afghanistan, Bolivia, and Chile thought that the Commission on Human Rights, as a body of experts, was the most appropriate organ to reach a decision on the matter. But the Commission had already considered this matter at its third, fifth, and seventh sessions, and had been

<sup>1</sup> See U.N. Doc. A/1494, *Report of the Sixth Committee on Reservations to Multilateral Conventions*; and U.N. Doc. A/1372, *Report of the Secretary-General on Reservations to Multilateral Conventions*.

<sup>2</sup> *I.C.J. Reports*, 1951, pp. 15, 29. For a critique of this case see Lauterpacht in *Transactions of the Grotius Society*, 1953.

<sup>3</sup> See *United Nations Yearbook*, 1953, pp. 384-6.



unable to arrive at a decision. Accordingly, the representative of Guatemala proposed a resolution<sup>1</sup> by which the Assembly would, instead, request the International Court of Justice for an Advisory Opinion on the desirability or undesirability of including a federal State clause in the Covenants, having regard to the universal application of those rights and the constitutional problems of some federal States. The resolution would also have had the Assembly request the Commission on Human Rights not to consider the matter before the Court had delivered its Opinion. This was a touching exhibition of faith in the Court, but hardly a practical one. Finally, the Third Committee passed a formal resolution,<sup>2</sup> later adopted without discussion at the plenary meeting of the General Assembly on 28 November 1953, instructing the Commission on Human Rights to decide, in the light of the Assembly's discussions, whether or not it was necessary to include a federal State clause in the Covenants.

### *The solution in the present Draft Covenants*

At the tenth session of the Commission on Human Rights, from 23 February to 16 April 1954, the question of a federal State clause was exhaustively considered.<sup>3</sup> Four alternative proposals were before the Commission for consideration. (1) The proposal of Egypt<sup>4</sup> was that the Commission on Human Rights 'decides not to include provisions relating to federal states in the draft international covenants on human rights'. (2) The text of the Draft Article proposed by the Soviet Union was as follows: 'The provisions of the Covenant shall extend to all parts of federal states without any limitations or exceptions.'<sup>5</sup> This was a federal State clause in name only, and would merely have made explicit the result intended by the Egyptian delegate. (3) The Draft Article proposed by the representative of Denmark to the seventh session of the Commission<sup>6</sup> was treated as a working paper at the tenth session.<sup>7</sup> This, as we have seen, was a federal State article in the form of a reservations clause. (4) Finally, there was again submitted the Draft Article<sup>8</sup> originally proposed by Australia, India, and the United States at the eighth session of the Commission, but which was submitted at the present session by Australia and India alone, the United States having withdrawn its sponsorship.<sup>9</sup>

The evolution of this last proposal is an interesting story. As originally drafted it contained two operative sections:

(a) In respect of any provisions of the Covenant, the implementation of which is, under the constitution of the federation, wholly or in part within federal jurisdiction,

<sup>1</sup> A/C.3/L.388.

<sup>2</sup> A/2573 V A.

<sup>3</sup> Commission on Human Rights, *Report of the Tenth Session*, Supp. No. 7 (Doc. E/2573).

<sup>4</sup> E/CN.4/L.343.

<sup>5</sup> E/CN.4/L.340/Corr. 1.

<sup>6</sup> E/CN.4/636.

<sup>7</sup> E/CN.4/SR.437.

<sup>8</sup> E/2447, Annex II, Sect. B, No. III.

<sup>9</sup> E/CN.4/SR.437.

the obligations of the federal government shall, to that extent, be the same as those of Parties which have not made a declaration under this article;

'(b) In respect of any provisions of the Covenant, the implementation of which is, under the constitution of the federation, wholly or in part within the jurisdiction of the constituent units (whether described as States, provinces, cantons, autonomous regions, or by any other name), and which are not, to this extent, under the constitutional system bound to take legislative action, the federal government shall bring such provisions with favourable recommendations to the notice of the appropriate authorities of the constituent units, and shall also request such authorities to inform the federal government as to the law of the constituent units in relation to those provisions of the Covenant. The federal government shall transmit such information received from constituent units to the Secretary-General of the United Nations.'

It was this text which was originally sponsored by the United States, Australia, and India. However, by 1953 the Bricker Amendment movement had got well under way in the United States and the implications of the text were looked at rather closely there. It was pointed out that if the Covenant were adopted the effect would be to give the Congress full power to enact legislation effective within the States to put the Covenant into effect. This was because, under the doctrine of *Missouri v. Holland*,<sup>1</sup> the implementation of the Covenant would fall wholly within federal jurisdiction, even though most of the items in the Covenant are within the normal domain of State legislative competence. Consequently, Congress would under the Constitution have full power, and subdivision (b) dealing with favourable recommendations to the States would be inoperative. The same result applies to Australia and India, because in these two Federations the treaty-implementing power is also plenary and can be exercised without regard to the normal federal/State distribution of legislative powers. Thus we had the anomalous situation of Australia, India, and the United States all sponsoring a federal State clause which was inapplicable to them and only really applicable to Canada, where the treaty-implementing power is indeed restricted.

Accordingly it was recognized, particularly by the Bricker Amendment proponents in the United States, that the federal State clause would have to go further and provide that the federal Government assumes no obligation to enact legislation which it could not constitutionally enact in the absence of the treaty. In other words, it would be necessary to insert the 'which' clause<sup>2</sup> of the Bricker Amendment into the federal State clause of the Draft Covenants. It was partly in order to placate American apprehensions that the following provision was inserted as paragraph 2 of the federal State Article to be submitted at the tenth session of the Commission:

'2. This Covenant shall not operate so as to bring within the jurisdiction of the

<sup>1</sup> (1920), 252 U.S. 416.

<sup>2</sup> 'A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.'



federal authority of a federal state making such declaration, any of the matters referred to in this Covenant which, independently of the Covenant, would not be within the jurisdiction of the federal authority.<sup>1</sup>

This would relieve the federal Government from an obligation to enact federal legislation on a subject outside its normal legislative competence, but—argued the proponents of the Bricker Amendment—even then it might be held that under the rule of *Missouri v. Holland* Congress would gain power fully to implement the Covenant although under no international obligation to do so.<sup>2</sup> The federal State clause might qualify the international obligation but not the constitutional power of implementation.

As a result of this Brickerite argument and other domestic political pressures, Secretary of State Dulles announced in 1953 that the United States would not ratify the proposed Covenants on Human Rights.<sup>3</sup> It was for this reason, then, that the United States withdrew its sponsorship from the federal State clause, which was therefore proposed to the tenth session of the Commission by Australia and India alone.

At that session, lasting from February to April 1954, the status of the United States delegation in the Human Rights Commission was compared to the Cheshire cat in *Alice in Wonderland*—that remarkable cat which had a grin on its face and was able to disappear leaving the grin behind. In this case the grin was the American delegation which remained in the drafting sessions after the American Government had formally rejected the work of such sessions in advance. The heavy difficulties under which the American delegation laboured because of the advance repudiation of the Covenants by its Government was revealed by the fact that, in contrast to American success in 1952 in blocking all attempts by the Soviet delegation to weaken the principles of individual liberty embodied in the Covenant, at this session American leadership in the Commission was rejected in favour of the Soviet Union's position on the two key points, the right to property and the federal State clause.<sup>4</sup>

<sup>1</sup> E/2447, Annex II, Sect. B. No. III.

<sup>2</sup> See *Hearings before a Subcommittee of the Committee on the Judiciary*, United States Senate, 83rd Congress, 1st Session (Bricker Amendment hearings) (1953), pp. 617, 621.

<sup>3</sup> Letter from Secretary Dulles to Mrs. Oswald B. Lord, United States representative on the Commission, *Dept. of State Bulletin*, 28 (1953), pp. 579–81.

<sup>4</sup> As if to climax and underline the change in climate and leadership in the human rights field after the arrival of the Bricker Amendment movement on the scene, the Soviet Government on 3 May 1954 ratified the Genocide Convention with much international fanfare and publicity. Although this ratification was recognized in the United States as a cynical effort to exploit public opinion by a nation which does not shrink from racial persecution and slave labour within its own borders, the American Government is hardly in a position to press this point. For the State Department in February 1956 announced that it was unwilling to support a proposed International Labour Organization Convention against the use of forced labour for political or economic purposes. The reason for this negative position is probably an internal one: a refusal to participate in international conventions affecting any matter that could conceivably be the subject of internal legislation. If that be so, the Bricker Amendment, though thus far rejected as part of American constitutional law, is in fact applied in political practice.

In spite of the American default, the federal State clause had such vigorous proponents at the tenth session of the Commission that the final vote was bound to be a close one. Those who favoured the inclusion of a federal clause of the pattern proposed by Australia and India stoutly maintained that most federal States would find it impossible to become parties to the Covenants unless such a clause were included, simply because most of the matters covered by the Covenants were within the jurisdiction of the constituent units of those States. While it was recognized that the Federation alone had a personality in international law and was able to make international commitments, it was argued that a purely legalistic approach to the problem would fail to take into account the realities of the situation. The existence of federal States was often the result of historical, ethnic, linguistic, economic, and social conditions. In some instances it was the consequence of a practical compromise which brought about a delicate balance in the distribution of power and authority between the Federation and its units. Therefore the whole question should be viewed in a broader context than that of classical international law alone. Some international instruments, such as the Constitution of the International Labour Organization and the Convention on the Status of Refugees, which embodied federal clauses, clearly recognized that fact and had adopted a pragmatic approach to the problem.

Opponents of the federal State clause pointed out, however, that these were the only two instances of special concessions being made to federal States in multilateral instruments. The I.L.O. Conventions, it was argued, were of a special character and could not be followed by the Commission as an example. Hitherto, with the exception of the I.L.O. Conventions, all federal States had been held responsible in respect of their territories as a whole for the international obligations which they assumed and none of the many treaties registered by the League of Nations, for example, made special arrangements concerning federal States. And since human rights were viewed as fundamental and inalienable, it was inconceivable to assert that they might legally not extend to certain parts of some countries. The insertion of a federal clause, it was felt, would contradict the spirit of the Charter and the Universal Declaration of Human Rights which recognized the principle of the universal application of human rights.

The most serious objection to inclusion of a federal clause, however, was the disparity it would create in the obligations of federal and unitary States. It was felt that this would be in contravention of the sovereign equality of States affirmed in Article 2, paragraph 1, of the Charter. To safeguard the principle of the equality of contracting parties, however, the Belgian representative proposed the following amendment<sup>1</sup> as an added paragraph to the clause sponsored by Australia and India:

<sup>1</sup> E/CN.4/L.344.



'4. A contracting State shall not be entitled to avail itself of the present Covenant against other contracting States except to the extent that it is bound by the Covenant.' The joint sponsors accepted this amendment.<sup>1</sup> Some members felt that the incorporation of the Belgian amendment in the Draft Article had rectified to a great extent the disparity in the obligations of federal and unitary States under the Article. Others did not. The proponents of the federal clause were finally forced to argue that the legal obligations were not always the most important elements of the commitments undertaken through international agreements. The ultimate obligation, it was asserted, was a moral and spiritual one; consequently, the limited scope of the legal obligations which would be undertaken by federal States would not be the full measure of their real commitments.

Finally, at its 441st meeting the Commission agreed to adjourn the vote on the federal clause proposals until after a decision had been taken on the question of reservations. The Commission then dealt with the question of reservations at its 442nd to 449th meetings, and was completely unable to reach agreement on any of the three aspects of the problem: the admissibility or non-admissibility of reservations, the nature and extent of admissible reservations, and the legal effect to be attributed to reservations.<sup>2</sup> Accordingly, it requested the Economic and Social Council to transmit the problem to the General Assembly at its ninth session.

The voting on the federal State proposals took place at the 450th meeting of the Commission. The Draft Resolution of Egypt<sup>3</sup>—that no federal clause be included in the Covenants—was voted on first and failed of adoption, the vote being eight in favour and eight against, with two abstentions. The Draft Article of the Soviet Union<sup>4</sup> was then voted upon and narrowly adopted by eight votes to seven, with three abstentions. As a consequence of the adoption of the text proposed by the Soviet Union, the Draft Article of Australia and India, and the Belgian amendment thereto, were not put to a vote. The text of the Article adopted (Article 28 of the Draft Covenant on economic, social and cultural rights and Article 53 of the Draft Covenant on civil and political rights) reads: 'The provisions of the Covenant shall extend to all parts of federal States without any limitations or exceptions.'

The adopted text is, of course, a federal State clause in name only. It makes special provision for federal States only to the extent of saying they shall have no special position. Indeed, it goes beyond this. For it seems not only to prevent inclusion of a federal State concession in the Covenants, but also to deny States with federal Constitutions the possibility of making reservations to meet their particular constitutional difficulties. This is the

<sup>1</sup> E/CN.4/SR.440.

<sup>2</sup> Commission on Human Rights, *Report of the Tenth Session*, Supp. No. 7 (E/2573), pp. 28-34.

<sup>3</sup> E/CN.4/L.343.

<sup>4</sup> E/CN.4/L.340/Corr. 1.

interpretation put on the clause by the Secretary-General in his annotation of the text of the Draft Covenants presented to the tenth session of the General Assembly in July 1955.<sup>1</sup>

The Commission on Human Rights completed the drafting of the two international Covenants on Human Rights at its tenth session in 1954. The Economic and Social Council referred these drafts to the General Assembly, which sent them to its Third Committee. During the Committee's discussions widely divergent views were again expressed on the federal State question.<sup>2</sup> It was pointed out that the federal clause adopted by the Commission did not comply with General Assembly Resolution 421 (V) C which had asked the Commission to study a federal State Article and to prepare recommendations with a view to (a) securing the maximum extension of the Covenants to the constituent units of federal States, and (b) meeting the constitutional problems of federal States. The draft adopted by the Commission was considered as meeting only the first element of the Resolution. In view of the close vote by which the clause had been adopted by the Commission, it was inevitable that the Australian representative should again submit the substitute text sponsored before the Commission by Australia and India. The Third Committee, however, did not vote on any of the proposals or amendments. Instead it recommended discussion during the Assembly's tenth session. Thus the matter is still pending and the problem of the federal State clause has yet to be definitely settled by the competent United Nations organs.

*Reciprocity: 'parity of obligation' and 'mutuality of remedy'*

The problem of reciprocity lies at the heart of all debate over a federal State clause. Once this is realized, it becomes clear that the question cannot be settled by the federal States among themselves without taking the interests of other States into consideration. The basic element in the assumption of any new international obligation is reciprocity, and this is true particularly of measures for the international protection of human rights. The chief motivating factor for any Government which undertakes international obligations in this area is that other Governments will be subject to the same obligations. This is even more so when some system of international supervision is attached to the treaty, like the machinery of the International Labour Organization,<sup>3</sup> or the proposed measures of implementation forming part of the Draft Covenants on Human Rights. Under the latest draft,<sup>4</sup> complaints by one State party to the Covenant against another State party for not giving effect to a provision of the Covenant

<sup>1</sup> Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, Doc. A/2929 (1 July 1955), p. 370.

<sup>2</sup> *United Nations Yearbook*, 1954, pp. 204 ff.

<sup>3</sup> See Article 26 of the I.L.O. Constitution.

<sup>4</sup> Articles 27-48.



may, after negotiations between the parties, be referred to a permanent committee for consideration. It is evident that no State will readily submit to such a system of sanctions unless it is certain that a complaining party cannot hide behind a shield of immunity. And it is likely that any signatory State would wish also to be able to become a complaining State whenever it feels its interests are prejudiced by non-compliance on the part of other signatories.

The problem of reciprocity, therefore, involves two distinct problems: 'parity of obligation' and 'mutuality of remedy'. Parity of obligation means simply that each signatory State assumes the same obligations as every other. Mutuality of remedy, however, implies only that a signatory under a lesser degree of obligation cannot become a complaining party against another State concerning a matter upon which that other State has assumed a greater obligation. The two concepts, then, are distinct though interrelated.

It was mutuality of remedy which was sought to be secured by the Belgian amendment to the federal State proposal sponsored by Australia and India. This amendment, as we have seen, provided that

'4. A contracting State shall not be entitled to avail itself of the present Covenant against other contracting States except to the extent that it is bound by the Covenant.'

The last paragraph of the Danish 'reservations clause' proposal had a like purpose. This paragraph read:

'5. As long as and to the extent that a reservation made under paragraph 1 remains in force, the government of the federal State may not in relation to other States Parties to the Covenant invoke the relevant provisions of the Covenant.'

Thus mutuality of remedy could be secured whether the inequality of obligation resulted from a blanket federal State clause or from a specific reservation made by the federal State.

A concrete example will illustrate this point. Suppose that India, as a federal State, elected to treat land ownership by aliens as a matter falling within the responsibility of the constituent States of the Federation. This concession could be the result either of a blanket federal State clause or of a specific reservation. Now suppose that South Africa prohibits land ownership by Indian nationals, in contravention of an Article in the Covenant.<sup>1</sup> Then, under either the Belgian amendment or the Danish draft, India would be precluded from becoming a complaining party against South Africa with respect to violations of this particular Article. This is because India itself could not be made a defendant on this same matter, since its federal structure immunizes it from responsibility. The doctrine of

<sup>1</sup> Thus far no article on the right of property has been included in the Draft Covenants because it has been impossible to reach agreement on the wording of the text. The Commission at its tenth session referred the question to the General Assembly: see Economic and Social Council, xviii, Supp. 7, paragraphs 40-71.

mutuality of remedy prevents a State from becoming a plaintiff on a matter upon which it could not be made defendant.

Mutuality of remedy, then, can be secured even in the face of a disparity of obligation. In this sense a federal State can be put under a lesser degree of obligation without enabling it to take advantage of this fact *vis-à-vis* other States. All this talk, however, relates merely to procedural prerequisites. It cannot explain away the fact that in substance the federal State is accorded a preferential position. A federal State clause can establish procedural reciprocity, but not substantive reciprocity.

### *Conclusion*

The fundamental problem is the propriety of making such a substantive concession to federal States in the form of a federal State clause, compromising the international law doctrine of the equality of States, in order to secure the maximum acceptance of international legislation. Unitary States are quick to point out that internal obstacles to a country's participation in international co-operation are no rare phenomenon, and by no means confined to Federations. International agreements often affect particular interests adversely, and provincial or local rights may be considered as just one type of interest. The problems with which a federal Government is faced are not necessarily unique. Speaking about the United States, Professor David Riesmann said:

'the political obstacles imposed by the constitutional framework . . . differ only in degree from the obstacles imposed in any scheme by the conflict between centralisation and decentralisation, between authority and liberty. In less dramatic form, these issues of our time appear of course in states which political scientists class as unitary, as well as in those which they class as federal.'<sup>1</sup>

The implication of this is that the federal problem is essentially a political problem and therefore deserves no special concession.

Certainly in the case of the United States, Australia, India, and Switzerland, the reasons underlying advocacy of a federal State clause are of a political nature, although based upon the constitutional structure of those States. Legally the federal Government can, however, fully implement any treaty obligation. Federal States such as Canada, in which the treaty power is limited in law by the rights of constituent States, are in a somewhat different position. Here the problem is genuinely legal in character. Short of constitutional amendment, the only possibility of full co-operation by a State like Canada is to ensure before ratification that the legislation of each separate Province is in conformity with the international text. This, again, is only a difference of degree from the position in unitary States,

<sup>1</sup> Riesmann, 'The American Constitution and International Labour Legislation', in *International Labour Review*, 44 (1941), pp. 123-93.



where the Government may not be able to ratify a treaty before legislative measures giving effect to its provisions have been carried through. It must be admitted, however, that the degree of difference is considerable. Securing legislative acts by a number of provincial or State Parliaments over which the federal Government has little political authority is a far more complicated affair than securing the passage of a bill in the Parliament of a unitary State.

Characterizing the problem in most Federations as political rather than legal still does not solve it. Particularly is this true with respect to treaties for the protection of human rights, which strike at the roots of the normal federal/State distribution of powers in most federal structures. Effective implementation of such treaties would require a drastic shifting of powers to the central Government, even though this could be done within the constitutional framework. A federal State clause seeks to obviate this. But since the bulk of the provisions of the Draft Covenants fall within the competence of the constituent units in almost every Federation, the result of a really effective federal State clause would be to render the obligation of every federal State largely nominal. The problem of enforcing a human rights covenant within a federal State, without drastically shifting the constitutional balance of power, is virtually insuperable. The federal State clause is a means not of solving, but of avoiding, the problem. Only in one particular instance of limited scope has a federal clause been adopted and inserted in a United Nations convention, namely, the Convention of 28 July 1951 Relating to the Status of Refugees.<sup>1</sup> The only other such clause is in the Constitution of the International Labour Organization, hardly a reassuring precedent. The technique for reconciling federalism with the new internationalism has yet to be devised.

<sup>1</sup> Article 41 of this Convention reads: 'With respect to those articles of this convention that come within the legislative jurisdiction of the constituent States . . .', &c.

# INTERNATIONAL ASPECTS OF RESTITUTION AND COMPENSATION FOR VICTIMS OF THE NAZIS

By PROFESSOR NORMAN BENTWICH

ONE of the Allied war aims, constantly repeated during the war, was to assure to the victims of the Nazis restitution of their property stolen, confiscated, or taken under duress, and compensation for loss of liberty, health, profession, and other forms of injury. After the unconditional surrender of Germany, the four Allied Powers, by a joint declaration of 5 June 1945, assumed supreme authority with respect to Germany, including all powers possessed by the German Government. As a result, they acquired the power to issue legislation with regard to restitution and compensation for the Nazi victims and, so far as restitution is concerned, retained this power in their own hands. Thus, the British Military Government Order of December 1946, which defined the powers of the *Laender* (provinces) of the British Zone, excluded legislation on restitution from the powers delegated to the *Laender*.

Three years later, when the Western Allies issued the Occupation Statute with regard to the division of legislative authority between the German Government in the *Laender* and the Allies, restitution was again one of the subjects specifically reserved for the Allies, 'in order to ensure accomplishment of the basic purposes of the occupation'. That meant that the Military Governments set up in 1945 in the occupied Zones, into which Germany was divided, were entitled to enact legislation binding on the German people and the German courts. It is notable that in both the Order and the Statute compensation, as distinct from restitution and reparation, was not a 'reserved subject'. The *Laender* could legislate about it, subject to review by the Military Government.

For two years it was hoped that a single law on 'restitution of identifiable property' for the four Zones would be enacted, and many drafts were discussed. Gradually the hope of quadripartite action was frustrated, because of the beginning of the cold war between the Soviet Union and the Western democracies. It was clear that the Soviet Union would not accept the principle of restitution of private property, and the other three Powers decided to proceed independently. Even the hope of a common law for the British, American and French Zones was disappointed; and, ultimately, each of these three Military Governments issued a different law.<sup>1</sup>

<sup>1</sup> Of restitution and compensation in the Soviet Zone we have little knowledge. At the outset of the occupation, a local law was passed about restitution in Thuringia, which was in the Russian Zone. It is said not to have been applied in favour of private claimants. Property



The legislation concerning restitution and compensation to victims of the Nazis was required because the National-Socialist régime had, on the one hand, violated in an unparalleled way fundamental principles of natural law and the rights of man in relation to its own subjects, and, on the other hand, had violated during the war in relation to the peoples of the occupied countries the accepted rules of international law concerning the rights of a military occupant. The exceptional legislation about restitution to German victims of the Nazis in form provides a civil remedy within German municipal law for wrongful acts of a former Government in matters which normally are exclusively matters of domestic jurisdiction, and therefore outside the purview of international law. The acts of the Nazi Government in its treatment of its own subjects were so shocking in their violation of the elementary principles of justice and humanity that their redress called for some form of international action. Today international law is seeking to bring such acts effectively within its jurisdiction by the development of a Charter or Bill of human rights; in the past such acts occasionally led to what has been called 'humanitarian intervention' on the part of other States. The action of the three Western Allies to redress the injustice done by the Nazi Government to Germans does not fall within the ordinary concept of intervention, since it was based on their special powers as the Supreme Authority in Germany after the unconditional surrender. The Allied supervision of the execution of the redress provided does, however, render their action akin to humanitarian intervention; and it is a conspicuous example of international action to remedy wrongs caused by the failure of a Government to observe minimum *international* standards for the treatment of human beings.

Legislation concerning compensation—as distinct from restitution of property—provides also what is, in form, a civil remedy within German law. It applies not only to those who were German subjects, but also to the Allied and other foreign nationals who were forced by the Nazis, in violation of the laws of war, to participate in the German war machine. They can claim for loss of liberty or loss of health, and the heirs of those who perished may claim for loss of life. This part of the legislation is in substance a sanction applied through international action for grave violations of international law by the former Government of Germany, for which the German State is responsible under international law.

confiscated by the Nazis was returned to democratic organizations, but there restitution stopped. Generally, private property of the Nazi victims was socialized. As regards compensation, the Soviet Military Government, and subsequently the Democratic Republic of Eastern Germany, gave benefits to the victims of Nazi persecution who were resident in the territory, but they would not pay compensation to persons who had left the territory. An amendment of the Compensation Law of the Federal Republic enacted in June 1956 provides for payment of compensation to former inhabitants of the Eastern Zone and the Eastern sector of Berlin who are now resident in the Western Zone or abroad. That extension indicates the interest of the Federal Republic in the whole of Germany.

What is probably the biggest legal process recorded in history, involving tens of thousands of foreign claimants living in all parts of the world, has been taking place during the last seven years, in accordance with that remedial legislation, in hundreds of courts, and before hundreds of administrative tribunals, in Western Germany and Western Berlin. The process is unique, not only in its scale, but in its innovations both in regard to municipal law and to international supervision of a matter of domestic jurisdiction. It calls therefore for the attention of jurists outside as well as inside Germany. It has already provoked in Germany a voluminous literature of textbooks, legal periodicals, and a special series of law reports. Hitherto little has been written in England concerning its legal aspects; but a recent article by Dr. E. J. Cohn in *The International and Comparative Law Quarterly*, concerning the Board of Review in the British Zone, is a notable exception.<sup>1</sup>

Many historical precedents, indeed, exist for the restitution of property or payment of compensation to former owners deprived of it in the course of civil or international wars. One of the earliest examples is the Treaty between Sparta and Athens at the end of the Peloponnesian war (403 B.C.) (see *Cambridge Ancient History*, vol. v, chap. 12, p. 372). The Treaty of Osnabruck, 1648, between the Holy Roman Empire and the King of Sweden, includes articles prescribing restitution of property in detail. Coming nearer home, Sir Winston Churchill, in his 'Life of the Duke of Marlborough', has recorded how an ancestor of the Duke, bearing his own name, Winston Churchill, was sent to Ireland, after the restoration of Charles II, as a commissioner to settle the claims of the Royalist landowners who had been deprived of their estates in Ireland by Oliver Cromwell (*Marlborough—His Life and Times*, pp. 43-48). And—what is the nearest parallel to the German legislation—a law of the French Revolution, of December 1790, provided for the restitution of the property of the Huguenots and other religious fugitives who had been driven from France a century earlier. These examples of the past, however, pale into insignificance in face of the immense apparatus which was set in motion by the Allied Powers after the unconditional surrender of Nazi Germany.

The American Military Government was the first to take effective action, promulgating in 1947 a Law of Restitution for the American Zone of occupation. Soon afterwards, the French authorities enacted a law for their Zone with much the same principles, but with considerable differences of detail. The British Military Government did not promulgate its law for the British Zone till May 1949; and finally, the Inter-Allied Governing Authority, or—in its Russian name—the Kommandatura, enacted a restitution law in 1950 for Western Berlin. In every case the laws were to be administered by

<sup>1</sup> Vol. 4 (1955), p. 492.



German agencies and German courts, subject to supervision by the Allied Control and to the final authority of a Supreme Appellate Court composed of Allied judges in each Zone. Each of the four Military Laws was a *lex specialis*, departing in many respects from the general principles of the German Civil Code with a view to secure justice in abnormal circumstances. They were drawn up by Allied lawyers in consultation with German legal experts; they were issued in German as well as in English and French, and the German was the official text.

The more important articles of the Law enacted for the British Zone are as follows:

(1) The purpose of the Law is to effect to the largest extent possible a speedy restitution of identifiable property to persons, whether natural or juridical, who were unjustly deprived of it between January 1933 and May 1945, by reason of their race, creed, nationality, or political opposition to National-Socialism. Deprivation of property by reason of nationality should not include measures taken in the course of the war solely on grounds of enemy nationality.

(2) Property is to be restored to its former owner, or his successor in interest, in accordance with the provisions of this Law, even though the interest of other persons who had no knowledge of the wrongful taking must be subordinated. The provisions of the Law for the protection of a purchaser in good faith, which would defeat restitution, are to be disregarded except where the special Restitution Law provides otherwise.

(3) Property is to be considered to have been the subject of unjust deprivation if the person entitled to it was deprived of ownership by a transaction *contra bonos mores*, or induced by threats or duress, as well as seizure by governmental or administrative action.

(4) Any transfer or relinquishment of property made by a person who was directly exposed to measures of persecution on grounds of race, &c., and any transfer or relinquishment of property made by a person who belonged to a class which the German Government or the National-Socialist Party intended to eliminate in its entirety from the cultural and economic life of Germany by measures taken by the State or the Party, is presumed to be an unjust deprivation.

(5) One or more trust corporations under German law are to be formed in the British Zone for the purpose of claiming unclaimed or heirless property. The regulations of the Military Government are to provide for the establishment of such corporations, for their rights and obligations. (It was felt that it would be shocking to let the ordinary law of escheat to the State apply in the case of heirless property or *bona vacantia*, which had belonged to victims of Nazi persecution whose families had been destroyed so that there was no heir.)

(6) The person liable to make restitution is the person who on the effective date of the Law was the possessor or holder of the affected property.

(7) The restitution proceedings are to be conducted in such a manner as to bring about speedy and complete restitution. The restitution authorities are to take fully into account the circumstances in which the claimant finds himself as the result of measures of vicious persecution. This is to apply when the production of evidence is rendered difficult or impossible through lack of documents or the death or non-availability of witnesses.

(8) Any persecuted person, or person interested in his estate, whose last whereabouts was in Germany or in a country occupied by Germany, and as to whose whereabouts after 8 May 1945 no information is available, is to be presumed to have died on 8 May 1945.

(9) Exclusion from the right of succession by will or on intestacy, which occurred during the material period by virtue of a legislative measure for any reason referred to in Article 1, is to be deemed null.

(10) A testamentary disposition made within the material period is to be valid, notwithstanding non-compliance with formal requirements, if the testator made it in view of actual, or imagined, immediate danger to life.

Under the Restitution Law, the potential heirs, however remote their relationship to the original owner, could present claims. But in many cases the Nazi brutal policy had exterminated all the family. Successor organizations were formed in the three Western Zones as American, British, and French corporations to recover this heirless property, and use the proceeds for the relief and rehabilitation of Nazi victims generally. They were granted the same privileges and immunities from taxation as officers of the occupant Powers. After a few years of litigation over individual claims, first the American, and then the British, corporations entered into negotiations with the Governments of the *Laender* for the global settlement of the claims. That meant that the German Provincial Government would receive the assignment of the remaining claims of the corporation against persons within its jurisdiction, in return for a lump sum payment, and the Government would be free to make such settlement as appeared appropriate to it. The last and largest settlements of the kind were concluded with the Government of Western Berlin in 1955 in respect of immovable property, and in 1956 with the Federal Government in respect of the claims to movable property confiscated by the Third Reich.

The restitution decrees of the Military Governments in the British and American Zones each contained an article providing for the appointment by the Military Governments of an Appellate Authority. In the British Zone it was called a Board of Review, which had power 'to review all



decisions and orders made under this Law, and nullify, amend, suspend, or otherwise modify them'. The Board was composed entirely of British judges, and it had authority to issue an advisory opinion on a legal principle which was binding on the German courts. The right of appeal lay not only from the German Appellate Court (*Oberlandesgericht*), but also from the German Restitution Chamber, which was a court of first instance. The right of audience was given to foreign lawyers; but in practice oral hearings by the Court were rare. Dr. E. J. Cohn, in the article mentioned above,<sup>1</sup> has pointed out the interesting aspect that a tribunal composed entirely of Common Lawyers pronounced finally on the judgment of Civil Lawyers. The judgments of the Board of Review have been published in twenty-one volumes; they are set out in both English and German texts. The Appellate Courts of the three Allies gave different interpretations of the German law, but no attempt was made to secure uniformity or to resolve the differences.

When, in 1954, the Military Governments of the Western Powers and the Control Commissions came to an end, the obligations of the German Government for restitution and compensation were not only maintained but substantially enlarged. The Contractual Agreements made between the three Western Powers and the German Federal Republic at Bonn, in 1952,<sup>2</sup> were like a Russian toy containing doll within doll. There were conventions within conventions, and charters within conventions. They included three specific agreements concerning the law and the courts to deal with restitution and compensation; and maintained a form of international control after Germany's sovereignty was restored. They are attached to a major Convention on 'the settlement of matters arising out of the war and the occupation'; and they impose limits on the restored national sovereignty of Germany in relation to matters which were controlled by the Allies during the occupation. They provide for the continuation of a measure of international supervision of the vast operation of restitution and compensation which will continue for years.

Article 2 of the major Convention prescribes that 'all rights and obligations created or established by legislative, administrative or judicial action of the Occupation Authorities shall remain valid for all purposes under German law, whether or not their creation or establishment was in conformity with other legislation'. Of the three Chapters of the attached Convention dealing with restitution and compensation, the first is entitled 'Internal Restitution', and is concerned with the restitution of identifiable property to the victims of Nazi oppression, pursuant to the Military Government laws of the three Western Powers. It is concerned also with

<sup>1</sup> *Supra*, p. 206.

<sup>2</sup> *British Treaty Series* (MD 8571/1952).

the restitution of property seized under the National-Socialist régime from co-operative societies, trade unions, charitable organizations, and other democratic organizations, and with the blocking, administration, and final disposal of such property. An Annex to the Chapter prescribes the composition and powers of a Supreme Restitution Court.

The second Chapter deals with compensation for the victims of Nazi persecution. The third Chapter deals with 'External Restitution', and provides for the establishment by the Federal Republic of an administrative agency which will search for, and restore, jewellery, silverware, antique furniture, and cultural property which, during the occupation of any territory, were removed by the Forces or Authorities of Germany or its Allies, or their individual members, after acquisition by duress, larceny, requisitioning, or other forms of dispossession by force. In this article we are concerned mainly with the first two Chapters.

The Federal Republic acknowledges the need, and assumes the obligation, to implement fully and expeditiously, and by every means in its power, the Allied legislation and programmes for restitution. It may supplement that legislation, but only in a manner consistent with its principles. It will maintain and augment, when necessary, the existing administrative and judicial agencies concerned with the blocking, administration, and disposal of the property which is the subject of restitution, and with the filing, investigation, adjudication, and final settlement of claims. The original agreements made at Bonn, in 1952, provided that the Three Powers should have access to the administrative and judicial agencies for the regular observation and inspection of all matters concerning restitution; and the Federal Republic undertook to furnish information and produce files and records. It is notable that, when the Bonn Conventions were revised in the final Agreement made at Paris in October 1954, on the termination of the Occupation régime, this provision was deleted. There had been an Exchange of Letters between the Federal Chancellor and the High Commissioners of the United Kingdom, the United States and France, with regard to facilities for observation and information about restitution proceedings. The Three Powers agreed to delete the clauses, and the Federal Government agreed that an official, designated by each of the three Governments for the purpose of reporting on the progress of the restitution programme, should be granted reasonable facilities and supplied with the necessary information, including statistics.

Similarly, with regard to compensation, the Federal Government agreed that adequate opportunity should be afforded to the Western Governments or their authorized agents for observation of all matters dealt with in the Chapter, so far as non-German nationals or residents are concerned. The undertakings of the Federal Government to preserve the records of these



cases, so far as not already covered by the German law, are recognized by the Federal Government as a natural obligation, which it is prepared voluntarily to assume.<sup>1</sup>

The Convention, both in its original and in its final form, includes an Article by which the Federal Republic undertakes to apply to non-residents, who are successful claimants under the restitution legislation, terms and conditions for the use and disposal of the property restored to them, and for the use and disposal of the Deutsche mark balances resulting from the satisfaction of restitution claims and the proceeds of sale of restitution property, including the conversion of the balances into foreign exchange and their transfer abroad.

Moreover, the Federal Republic undertakes to ensure the payment to claimants for restitution of judgments or awards against the former German Reich on account of the confiscation of movable property, shares, banking accounts, jewellery, furniture, &c. Tens of thousands of such claims have been brought under the Restitution Law during the last seven years; but hitherto there was no fund available for meeting the claims. The Convention provides that the Federal Republic is liable up to a total sum of one and a half billion marks (£125,000,000). It contains also an express provision that the debts of the former Reich, which were expressed in Reichsmark, shall be converted into Deutsche marks at the rate of ten Reichsmark for one Deutsche mark. The law to implement this provision of the Convention is still to be passed; but the Bill is now—July 1956—before the German Federal Legislature.

A vexed question, which had constantly come before the German tribunals in claims by former residents of Berlin for property confiscated by the Nazis, was settled in 1954 by Ordinance of the Allied Kommandatura in Berlin. It provided that claims for restitution can be made by, or on behalf of, any person who had resided or had a place of business in Western Berlin, though the actual confiscation of the property by the Nazi authorities took place in the Eastern (i.e. the Russian) Sector. The Treasury of the Government in Western Berlin had pleaded that there was no liability in such cases. An Article of the Convention on 'Internal Restitution' provides also that the Federal Republic shall assume by appropriate arrangements with the City of Berlin liability for the payment of judgments and awards against the former German Reich under the internal restitution legislation in force in the Western Sectors.

The Convention contains another Article by which the Allied successor organizations and trust corporations (referred to above, p. 207) which operate in the Western Zones and Sectors shall continue to enjoy immunity from Federal taxation and from any exceptional tax or levy imposed for

<sup>1</sup> Cmd. 9304 (pp. 21-22); Cmd. 9368 (pp. 164-5).

the purpose of meeting charges arising out of the war, or out of reparation or restitution to any of the United Nations.

The last Article of the Chapter provides for the establishment of a Supreme Restitution Court, to be the successor to the three appellate bodies in the three Zones. The Charter annexed to this Chapter makes it clear that there will be not a single court for Western Germany, but three Divisions—they are called Senates—corresponding with the old Board of Review in the British Zone, Court of Restitution Appeals in the American Zone, and Higher Court for Restitution in the French Zone. Each Division is composed of at least five Justices, of whom two are to be appointed by each of the Allied Governments for its Zone, two by the Federal Government, and one by agreement between the Western Power concerned and the Federal Government or, failing such agreement, by the President of the International Court of Justice. The last Justice is to be neither a national of any of the three Powers nor a German national; and he is the President of the Court. In fact, the Presidents of the three Divisions of the Supreme Court, who have been appointed, are Danes in the British and American Zones, and a Swiss in the French Zone. In Berlin, the Supreme Restitution Court is composed of seven members—an English, an American, and a French judge, three German judges, and a Swedish President. The Courts are a valuable example of an international judiciary dealing with municipal law, like the Mixed Courts which existed in Egypt till the end of the Second World War. It is notable that the three Scandinavian Presidents of the Supreme Restitution Court were formerly judges of those Mixed Courts. The judgments of the international judiciary will be an important source of international jurisprudence in matters of private law.

The Constitution of the Supreme Restitution Court implies that it is an international and not a German court. The Presidential Council of the Court, consisting of the Presidents of the three Divisions, is to render an annual report to the Governments of the three Powers as well as to the Federal Government. The salaries and allowances of the judicial, administrative and other staff of the Court who are nominated, appointed or employed by the Government of any of the three Powers, are established, fixed and paid by that Power in consultation with the Federal Government, and reimbursed to it by the Federal Government. Persons appointed by the Government of any of the three Powers are subject to the administrative and disciplinary control of the appointing Power. The official languages of the Presidential Council are English, French, and German; and of the Divisions of the Court, English and German, or French and German.

Provision is made in the Convention on the Relations between the Three Powers and the Federal Republic of Germany for any question about the



competence of the Supreme Restitution Court which cannot be settled by negotiation to be referred to an International Arbitral Tribunal. This Tribunal is composed of nine members, who are to be qualified in their respective countries for appointment to the highest judicial office, or lawyers of recognized competence in international law. They must, in other words, have the same qualifications as Judges of the International Court of Justice. Of the nine members, one each shall be appointed by the Government of the three Powers, three by the Federal Government, and three—the President and two Vice-Presidents—by agreement between the Government of the three Powers and the Federal Government or, failing agreement, by the President of the International Court of Justice. These three are described as ‘neutral’ members, and shall not be nationals of any of the three Powers or a German national. Only Governments may be parties before the Tribunal. Hitherto, the Tribunal has not been called upon to decide on any dispute as to the competence of the Supreme Restitution Court.

The English statute, the German Conventions Act, 1955,<sup>1</sup> which was designed to give effect to the Bonn Conventions and the Protocol signed at Paris in October 1954, contains an article dealing with the status and diplomatic immunities of judges, officers and clerks of the Supreme Restitution Court. They shall not be liable to any legal proceedings in respect of an act performed in the execution of their official duties; and the International Organizations (Immunities and Privileges) Act shall be applicable in relation to the members of the Arbitral Tribunal and the Arbitral Commission, other than citizens of the United Kingdom and the Colonies.

External restitution, which forms the subject of the third Chapter of the Convention (see p. 210 above), was required by the Western Allies in order to correct the abuse of the rights of the military occupant in regard to private property. The Nazis, during the war, acted in utter disregard of the laws and practices of war on land concerning private property, and treated precious things and antiques, both in public and private collections of the occupied territories, as loot. This Chapter of the Convention defines cultural property and antiques, and provides for the setting up of a special agency of the Federal Government to deal with claims for recovery. During the period of Allied control such property was restored to the Government concerned according to a procedure laid down by the Control Council.

The agency, which is in fact established at Bad Homburg, will give information to the Three Western Powers or their representatives, and submit quarterly reports. Restitution may be requested only by the Government of the State from the territory of which the property was removed.

<sup>1</sup> 4 Eliz. II, c. 2.

All the European States occupied by the Germans have a right of claim. A similar provision to that in the Internal Restitution Law subordinates the right of the present possessor of the property to the right of the claimant, subject to payment by the claimant of the value of any consideration received by him or his predecessor in title.

The signatory States are to establish an Arbitral Commission, which has power to revise the decisions of the German Agency or the German Courts dealing with external restitution. That will be another international tribunal composed similarly to the Supreme Restitution Court. It is established for a minimum term of ten years, and will have exclusive jurisdiction on all disputes within its competence. Individuals, as well as States, may have direct access to the Commission by way of appeal. Not only is the composition of the Commission international, but the law it is to apply is ultimately international law. It is directed to decide according to the provisions of the Convention and any legislation made applicable thereby, and, where necessary to supplement such provisions, to apply the general principles of international law and of justice and equity. As is remarked by the Legal Adviser to the British Embassy in the Federal Republic, it is rare to give to an international arbitral body appeal jurisdiction over municipal courts.<sup>1</sup>

The procedure in claims for compensation—as distinct from restitution—for the sufferings of victims of Nazi persecution other than loss of property, has been more complicated and more protracted. The claims cover damage to life, limb, health, liberty, property, possessions, or economic prospects, and may be brought by all persons persecuted for their political convictions, race, faith, ideology, or by reason of their nationality, in disregard of human rights. During the period of Allied occupation compensation was not a subject of Allied legislation, unlike restitution of identifiable property. It was dealt with by local laws passed by the provinces (*Laender*) of the Occupied Zones, but the Military Governments had the right to approve or disapprove of the local laws. Before Western Germany was federated, each *Land* could, and did, enact its own law, and there was great variety in the enactments. While a large part of the claimants were German citizens resident in the country, a large part were subjects of the satellite countries, or of countries occupied by the Nazis who had been forced into the Nazi labour machine, and former inmates of the Displaced Persons camps who had been repatriated to their original home, or resettled by the agencies of the United Nations or by voluntary bodies. The laws passed by the *Laender* of the American Zone provided for compensation on account of loss of liberty and health for all who had suffered in the camps of Germany, whether now resident in Germany or abroad. The laws of the provinces in the British Zone, however, were much less adequate and, with small

<sup>1</sup> See Bathurst and Simpson, *Germany and the North Atlantic Community* (1956), pp. 181-2.



exceptions, limited the right of recovery to those resident in the Zone. The discrepancy was recognized as unsatisfactory; and the Convention between the Western Powers and the Federal Republic, in 1952, stipulated that the Federal Government 'shall issue a comprehensive law of compensation which shall apply to the whole territory of the Federal Government'. The law shall be not less favourable to claimants than the legislation in force in the United States Zone. It shall take into account the special conditions arising from the persecution itself, including the loss and destruction of records and documents or the acts of the persecuting agencies, and the death or disappearance of witnesses. The provision of funds adequate to meet all claims shall be ensured by the Federal Republic.

The Federal Government undertook to pay compensation to persons persecuted by reason of nationality who are political refugees (e.g. Poles, Roumanians) and are stateless or no longer enjoy the protection of their former home country. It was an example of the right of intervention retained by the Western Allies that in April 1956 the Foreign Secretary said,<sup>1</sup> in reply to a question in the House of Commons, that the Government was not satisfied with the way in which a stateless person, who was persecuted by reason of nationality, is awarded less compensation than a person persecuted for other reasons. Representations on the subject were made by the British Embassy to the Federal Government.

After it had signed the Contractual Agreements with the Western Powers concerning the principles of the compensation law, the Federal Government discussed the specific provisions of the legislation with the representatives of the Jewish communities of the world, and agreed to enlarge considerably the scope of the compensation action. That was a voluntary act on their part, and was bound up with the negotiations with the representatives of the State of Israel concerning payment of indemnities to the Jewish State. The international aspect of this reparation issue is examined later.

The Federal Compensation Law was in fact enacted in September 1953; but at once the Allied Authorities, as well as many non-governmental bodies, inside and outside of Germany, began to press for its amendment and reform, on the ground that it contained many discrepancies, and excluded important classes of claimants who had as strong a right to compensation as those who were covered. For example, residents in Eastern Germany and the Eastern Sector of Berlin who were now living abroad were originally excluded. The German Government undertook to draft amending legislation to remedy these discrepancies, and after protracted debates in the *Bundestag* and the Cabinet, the Bill was enacted in June 1956.

The number of claimants for compensation is greater than the number of

<sup>1</sup> See *Hansard*, 12 March 1956, vol. 550, No. 115.

claimants for restitution, and the operations will take much longer to execute. Already more than 7,000 officials are engaged in the compensation offices, and new tribunals have been set up locally to deal with the claims coming from abroad from particular foreign regions. Cologne is the centre for Europe; Mainz for South America, and so forth. German sovereignty is indeed less affected by the far-reaching provisions for compensation than it was by the Law concerning restitution of property; for the Law and the Courts dealing with compensation are purely German, and the final appellate authority is the Supreme Federal Court, which sits at Karlsruhe. There is nothing in the nature of a mixed international court like the Supreme Appellate Tribunal in restitution cases. If a foreign claimant is discontented with the application of the law, the Power concerned, of which he is a subject, can take steps only by diplomatic action in accordance with the normal rules concerning denial of justice to aliens.

The proof of claim for compensation is likewise more complicated than the proof of claim for restitution of identifiable property. Registers existed of the immovable property confiscated or sold under duress, and some evidence of the title of the claimant, or of the successor of the former owner, was usually available without too much search. But how to prove confinement in concentration camps or enforced labour camps? How to prove the income of the holder of a doctor's or a lawyer's practice twenty years ago, or the prospects of an artistic career which had been rudely interrupted twenty years ago by National-Socialist legislation or administrative action? A helpful factor in regard to proof of confinement has been the almost fantastic German passion for keeping a show of legality to cover the most atrocious administrative actions, and the preserving of a complete record of mass crimes.

The Allies recovered the registers of some of the most terrible concentration camps (Buchenwald, Dachau, &c.), and tens of thousands of files of property confiscated by the Nazi Government. An international agency has been called upon to prevent the destruction of these incriminating records. An international tracing service, first constituted by voluntary bodies shortly after the end of the war, was taken over in 1948 by specialized agencies of the United Nations, namely, U.N.R.R.A. and I.R.O.; and after I.R.O. came to an end, it was maintained by an inter-Allied commission in the Hessian town of Arolsen. When the Federal German Government regained sovereignty in 1955, an agreement was obtained for the guardianship of the records by the International Red Cross of Geneva. At Arolsen, while the staff which carries out the search in the registers of the concentration camps and the Displaced Persons camps, and in the master-index of eighteen million names, is mainly composed of German civil servants, the institution is supervised by a few Swiss officers; and an international



committee representing nine States meets periodically at Bonn to decide on the policy of the Institute.

A last aspect of the German indemnification for the shocking acts of the National-Socialist Government is a belated example of justice, voluntarily undertaken by the Federal Government. It was not imposed by the Western Allies, though it was encouraged by them. In September 1951 Dr. Adenauer made a declaration in the *Bundestag* of the desire of his Government to make reparation to the State of Israel and the Jewish people for 'the unspeakable crimes which were perpetrated in the name of the German people', and which imposed on them the obligation to make moral and material amends. 'The Federal Government', he said, 'are prepared, jointly with representatives of Jewry and the State of Israel, which has admitted so many hopeless refugees, to bring about a solution of the problem of material reparation in order to facilitate a spiritual purging of unparalleled suffering.' At the end of previous wars the vanquished have usually been compelled by the victors to pay indemnities as compensation for their losses. There is, however, no historical precedent for the voluntary payment of indemnities by a defeated State on account of the wrongs done to a minority of its subjects or to a people who, at the time of the sufferings, were not constituted as a political nation in a State.

After long negotiations in Holland, an Agreement was signed at Luxemburg, in 1952, between the Federal Republic and Israel for the payment, over a period of ten years, by the Republic of goods—from current production—and credits to the value of over 800 million dollars, including a substantial sum for the Jewish sufferers outside Israel. Will this action of material atonement form a precedent in any future case of 'genocide', as it is now defined, and which is declared by an international Convention of the United Nations to be an international crime? It is a solacing reflection that, while the vast apparatus of the trials of war criminals by international and Allied Courts has, to a great extent, been whittled down by amnesties induced by political considerations, the comprehensive measures of restitution, compensation, and indemnities for the victims of Nazi oppression have proceeded steadily for ten years from the end of the war. That part, at least, of the Allied programme for requiring retribution by Germany as a condition of her resuming sovereignty is likely to be realized.

# THE HAGUE REGULATIONS AND THE SEIZURE OF *MUNITIONS DE GUERRE*

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OF the fourteen Articles in the Fourth Hague Convention concerning the Laws and Customs of War on Land which form the Chapter entitled 'Of the Military Authority over the Territory of the Hostile State', no less than eleven contain provisions dealing with the protection of property, whether owned by private persons, municipalities or the State. Indeed, it would appear that the Hague Regulations are as concerned to protect property interests situate in occupied territory as they are to safeguard the person of the inhabitants of the territory.<sup>1</sup> While the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949<sup>2</sup> has concentrated almost exclusively on the elaboration of the general principles for the treatment of persons contained in the Hague Regulations, the emphasis in the Hague Regulations on the preservation of property is a reflection of the principle that regulation of the treatment of the person of the inhabitants of the occupied territory without reference to the treatment of their property would provide very inadequate protection for the entirety of interests which requires to be safeguarded against the power of the Occupant.<sup>3</sup>

At the same time, in acknowledgement of the necessary requirements of the forces of occupation, the Hague Regulations recognize certain exceptions to the principle that private property is immune from seizure. The precise definition of these exceptions becomes a matter of particular importance if there is any danger that their extension may prejudice the proper application of the principal rule. This is the very danger which arises in connexion with the use of the term *munitions de guerre* as the description of a category of private property which may be seized by way of exception under Article 53 of the Hague Regulations. The second paragraph of this Article provides that 'All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of

<sup>1</sup> This tendency appears to have existed for some years prior to 1899. Thus Graber, *Development of the Law of Belligerent Occupation, 1863-1914* (1949), p. 194, states that 'the publicists of the Lieber period devote more space to the treatment to be accorded private property than to the protection of personal rights'.

<sup>2</sup> Miscellaneous No. 4 (1950), Cmd. 8033.

<sup>3</sup> '... in so far as motives of humanity urge the applicability of rules of war equally to both belligerents, it is possible that these considerations apply also to a large extent to rules connected with the acquisition of title to property. For in many cases the law in question is designed to protect the individual and the economic life of the occupied territory from the hardships and exactions of war.' H. Lauterpacht, 'The Limits of the Operation of the Law of War', in this *Year Book*, 30 (1953), p. 231.



persons or goods, apart from cases governed by maritime law, dépôts of arms, and, generally, all kinds of war material [*munitions de guerre*] may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace'.<sup>1</sup> It is clear that if, in this context, the expression *munitions de guerre* is interpreted loosely as synonymous, for example, with war material generally, then the exception may become so wide as to render nugatory the substantive rule. It is therefore a matter of concern if attempts are made to ascribe, in a manner believed to be inimical to the purpose of the Hague Regulations and alien to the intentions of their draftsmen, a broad meaning to the term.

Such attempts have, however, been made. Thus, we find one writer suggesting that 'property seized under Article 53 need not be directly usable for military operations, as in the case of ammunition, but it is sufficient if it serve that purpose indirectly'.<sup>2</sup> Another has defined *munitions de guerre* in the broadest terms as comprising 'all movable articles for which a modern army can find any normal use'.<sup>3</sup> In elaboration of this definition, the same author continues: 'These will include, among other things, all forms of food, drink, and tobacco, since it is not in practice possible to draw fine distinctions between the more popular and the more luxurious varieties, but will not include such articles as scent, cosmetics or silk stockings. . . . It will be seen that the problem of defining "war material" is substantially the same as that of defining "contraband" in the law of naval warfare. . . . The result is that the categories of things liable to seizure in modern war cover almost the entire range of ordinary commerce.'<sup>4</sup>

The basic premiss underlying this and similar views is that 'modern developments have rendered obsolete most of the problems so keenly controverted in the past'.<sup>5</sup> As with other generalizations, it is probably not necessary to subscribe to, or to reject, this view in its entirety. It must be admitted, for example, that the law of prize has altered greatly under the impact both of new conditions and of the doctrine of reprisals.<sup>6</sup> Changes of comparable extent have taken place in the law of neutrality. However,

<sup>1</sup> As translated in Pearce Higgins, *Hague Peace Conferences* (1909), p. 251.

<sup>2</sup> Freeman, 'General Note on the Law of War Booty', in *American Journal of International Law*, 40 (1946), p. 795, at p. 798. He recognizes (at p. 799) that this is 'a shallow test', but gives as examples of objects which are not directly usable only such things as books, pictures and collections of various kinds. Although he is probably only referring to objects seizable under the first paragraph of Article 53, his statements have been construed (possibly wrongly) as referring as well to the content of *munitions de guerre* in the second paragraph of that Article.

<sup>3</sup> H. A. Smith, 'Booty of War', in this *Year Book*, 23 (1946), p. 227, at pp. 228-9. Feilchenfeld, *International Economic Law of Belligerent Occupation* (1942), p. 40, also tends to identify *munitions de guerre* with *matériel de guerre*. Svarlien, *Introduction to the Law of Nations* (1955), p. 381, states that '... almost everything which is of use to the belligerent in his war effort may be seized without regard to its public or private ownership'.

<sup>4</sup> Smith, loc. cit.

<sup>5</sup> Ibid

<sup>6</sup> See Rowson, 'Modern Blockade: Some Legal Aspects', in this *Year Book*, 23 (1946), p. 346.

regardless of the question of the wider application of the premiss, an attempt will be made in this article to suggest that it has no application to the interpretation of the term *munitions de guerre*; that the term, while flexible, is so only within narrow limits; and that any identification of the term with 'contraband' is really not justifiable. While some of the difficulties surrounding this aspect of the law of belligerent occupation have been due to a measure of looseness in the translation of the term *munitions de guerre*—a factor which explains the title of the present article<sup>1</sup>—the issue involved is of wider import. For it constitutes one aspect of the more general question as to the extent to which total war has rendered obsolete some of the fundamental principles of the traditional law of war.

*The Hague Regulations and the protection of private property.*—The far-reaching consequences of the acceptance of an expanded conception of the term *munitions de guerre* can be clearly seen if the provisions of the Hague Regulations relating to the protection of property in occupied territory are viewed as a whole. While there may be room in this connexion for controversy as to whether the Regulations are permissive or prohibitive,<sup>2</sup> there appears to be a general consensus of opinion that the legality of the taking by an Occupant of private or public movable property must be judged by reference exclusively to the Hague Regulations—at least in those cases where the owner is deprived of his property against his will.<sup>3</sup>

The general structure of the Regulations in relation to private property is based upon two principles, expressed in Articles 46 and 47 respectively, namely, that 'private property cannot be confiscated' and that 'pillage is formally prohibited'. In relation to the liability of the population to the levy of taxation and of other pecuniary contributions, it is not necessary in this connexion to do more than refer to those Articles which give effect to these principles. These matters are dealt with in Articles 48–51 in-

<sup>1</sup> The authoritative text of the Hague Conventions is in the French language. It is only necessary to refer to some of the translations of the expression *munitions de guerre* to show that there may be some connexion between the way in which it has been rendered into English and the controversy as to its meaning. In one official text presented to Parliament in January 1908 (Miscellaneous No. 1 (1908), Cmd. 3857), the translation is 'ammunition of war'. In other versions, such as that appearing in Scott, *Reports of the Hague Conferences* (1917), p. 520, the translation is 'munitions of war', while that used in the official text of the Final Act of the Second Hague Conference, as presented to Parliament in July 1908 (Miscellaneous No. 6 (1908), Cmd. 4175) and in Higgins, *Hague Peace Conferences* (1909), pp. 250–1, speaks of 'war material'. In order, therefore, to avoid the difficulties arising in connexion with translation, the French expression will be used throughout this article.

<sup>2</sup> See, for example, the observations of Arbitrator Hines in his Award on *Questions arising as to Danube Shipping*, *Reports of International Arbitral Awards*, vol. i, p. 97, at p. 104: 'International law as applied to warfare is a body of limitations, and is not a body of grants of power.'

<sup>3</sup> See below, p. 235, where the right of an Occupant to acquire property by purchase is considered. And see also p. 231, n. 1, below, for a reference to the exclusion of particular rules of municipal law such as those relating to *specificatio*.



clusive. But, for most practical purposes, the provisions of the Hague Regulations which matter, as regulating the manner and form in which an Occupant may acquire or use the tangible property of private persons and of the State, are Articles 52 and 53.<sup>1</sup>

Article 52 is concerned solely with private property, to which it gives a very considerable degree of protection. It recognizes that in certain circumstances the Occupant may lawfully obtain title to the property of individuals resident in the occupied territory. At the same time, the Article subjects the exercise of that right to five restrictive conditions, namely, that requisitions can be demanded only for the necessities of the army of occupation; that they must be in proportion to the resources of the country; that they must not be of such nature as to imply for the population any obligation to take part in military operations against their country; that they shall be demanded only on the authority of the commander in the locality occupied; and, finally, that they shall, as far as possible, be paid for in ready money and, if not, that their receipt shall be acknowledged and the payment of the amount due shall be made as soon as possible. Provided that all these conditions are satisfied, the requisition is lawful and the Occupant acquires the title to the property which he has taken. On the other hand, if these conditions are not satisfied, the taking is not lawful, the Occupant probably does not acquire title to the property taken,<sup>2</sup> and he incurs an obligation to pay full compensation for the property of which he has wrongfully deprived the inhabitants.

Article 53, on the other hand, is concerned primarily with the property of the occupied State (as opposed to the property of its inhabitants). The Occupant may take possession of such property, provided that it may be used for operations of war. This is a power which is at the same time both narrower and wider than the power of requisition which the Occupant enjoys in relation to private property under Article 52. It is wider principally because the Occupant is not limited by the restriction that property should be required only for the necessities of the army of occupation. It is narrower for the reason that the Occupant does not acquire title by his act of seizure, but only obtains a right to use the property (if necessary, to the point of consumption or destruction) subject to an obligation, when peace is made, to restore such property or pay an indemnity if the property is not returned or has deteriorated.

In one important respect, however, Article 53 contains provisions which go beyond the regulation of the seizure of public property, namely, in the licence given to an Occupant in the second paragraph to seize *munitions de*

<sup>1</sup> Articles 54, 55, and 56 are also relevant generally to the treatment of property, but they raise no issues relevant to the present problem.

<sup>2</sup> See, generally, Morgenstern, 'Validity of the Acts of the Belligerent Occupant', in this *Year Book* 28 (1951), p. 291; H. Lauterpacht, loc. cit., p. 225.

*guerre* even if they are private property. This right is one which may be exercised without reference to the conditions imposed by Article 52. In particular, the property taken need not be required for the needs of the army of occupation; nor need the quantities taken be in proportion to the resources of the country; nor is there any express obligation to make payment so far as possible in ready money or, if that is not possible, to make payment of the amount due as soon as possible. Relieved of these restraints, a belligerent may lawfully seize objects which may properly be called *munitions de guerre* in as large quantities as he sees fit<sup>1</sup> and export them from the occupied territory for use elsewhere. In respect of this class of property the Occupant is entitled to use the occupied territory as a source of supply for the pursuit and promotion of his war effort in other theatres of war, subject only to the obligations of restitution or indemnification.

In these circumstances, it can be seen that if *munitions de guerre* is construed as a narrow conception restricted to weapons, ammunition, and equipment used directly in acts of offence or defence, the right which an Occupant enjoys in this connexion is of limited value. The position is different if the expression is given a meaning which is flexible and elastic. The more the Occupant can claim as falling within the orbit of that term, the greater is his freedom of action in relation to private property situate within the occupied territory. The degree of protection enjoyed by the civilian population is correspondingly smaller.

*Munitions de guerre prior to the Hague Regulations.*—The fact that the Hague Regulations regulate in such detail the protection of private property suggests that it was not the intention of the original parties to the Regulations to provide the Occupant with the loophole created by a flexible and almost infinitely expandible notion of *munitions de guerre*. This view of the matter is supported if regard is paid not only to the antecedents and the *travaux préparatoires* of the Fourth Hague Convention, but also to the meaning of that expression at the time when the Hague Regulations were being drawn up.

An important factor in the situation is that the protection which the Hague Regulations give to private property reflects a substantial and, in 1899, a comparatively recent change in the law. There appears to be general agreement that, at least until the end of the Napoleonic Wars, the rule commonly accepted in respect of the treatment of private property in occupied territory was that there were no limits upon the right of seizure on the part of a belligerent. The statement of G. P. von Martens that 'The conqueror has a right to seize on all the property of the enemy that comes

<sup>1</sup> This appears to be the view of Feilchenfeld, *op. cit.*, p. 40, who says that 'the economic ability of the country to stand such seizure need not be examined'. This view may require modification, however, in the light of the condemnation of economic plunder in the War Crimes Trials; see below, p. 232.



within his power; it matters not whether it be immovable or moveable. . .',<sup>1</sup> may be taken as a representative formulation of the law in its earlier condition. However, by the middle of the nineteenth century the position appears to have altered substantially. The view prevalent thereafter and reflected in the works, for example, of Kent<sup>2</sup> and Bluntschli<sup>3</sup> and, to a lesser degree, Klüber,<sup>4</sup> is that, subject to certain exceptions, private property in occupied territory is inviolable. The fact that the change in the customary rule was so complete is important, for it means that henceforth specific authority must be found in custom or in treaty to justify any encroachment upon private property. In effect, the burden of proof is placed upon the party who seeks to justify a seizure of private property in occupied territory.

In tracing the development of the exceptions to the rule of inviolability, it is convenient to start with the Code prepared by Francis Lieber in 1864.<sup>5</sup> He stated, in paragraph 37 of the *Instructions*, that 'the United States acknowledge and protect, in hostile countries occupied by them . . . strictly private property'. In the same and in the following paragraph he laid down certain exceptions: 'This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans . . . or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses. 38. Private property . . . can be seized only by way of military necessity. . . .' It may be observed that while Lieber recognizes that an occupant has a special interest in the acquisition of means of transport, he does not refer at all to munitions of war. The exceptions which he recognizes to the rule of the inviolability of private property are thus limited to objects which may be of immediate or, as he suggests, 'temporary and military' use. Even when he refers to 'military necessity' in paragraph 38, it seems that he is referring not to the overall necessity of winning the war, but to the immediate exigencies of the local military situation.

The words *munitions de guerre* were first used in defining the exception to the immunity from seizure of private property in the Preliminary Project prepared for Consideration at the Brussels Conference in 1874. As a 'Note' to paragraph 6 which dealt exclusively with the right of an Occupant to seize 'all Government property which may assist the objects of the war',

<sup>1</sup> *The Law of Nations* (4th ed., 1829, translated by Wm. Cobbett), p. 293. See also Burlamaqui, *Principes du droit de la nature et des gens*, vol. 5 (1821), chap. 6. For a general statement of the development of the law see Hall, *International Law* (8th ed.), pp. 508-9; Butler and Maccoby, *Development of International Law* (1928), pp. 143-8.

<sup>2</sup> *Commentary on International Law* (ed. by Abdy, 1866), p. 243.

<sup>3</sup> *Le Droit international codifié* (5th ed., 1895), p. 371: 'Le droit international actuel interdit absolument de faire du butin en temps de guerre.'

<sup>4</sup> *Droit des gens moderne de l'Europe* (1861), pp. 321-2.

<sup>5</sup> *Instructions for the Government of Armies of the United States in the Field*, reprinted in Lorimer, *Institutes of the Law of Nations*, vol. ii (1884), p. 303.

the Preliminary Project provided that 'All railway rolling-stock, although belonging to private companies, as also depots of arms, and, generally, all kinds of munitions of war [*toute espèce de munitions de guerre*] although belonging to private individuals, shall be equally subject to seizure by the army of occupation'.<sup>1</sup> Subject to minor changes which are not immediately relevant, this wording is to be found in the final text of the Brussels Declaration.

In the following year, the Institute of International Law, in a comment on the terms of the Declaration, made the following observation: 'Doubtless the elasticity or vagueness of certain expressions may give rise, from a legal point of view, to rigorous criticism; but this difficulty must be regarded as an inevitable consequence of the necessity of obtaining, above all, an agreement among the various States, and of ensuring the existence of this agreement by mutual concessions. . . .'<sup>2</sup> Nevertheless, the words *munitions de guerre* do not appear to have been considered as either elastic, vague, or otherwise calling for rigorous criticism. Nor, indeed, does there seem to have been any difficulty about securing agreement on the inclusion of the words or the substance of the idea which they represent. It is a feature of the drafts and discussions which preceded the adoption of the Draft Declaration by the Brussels Conference that no discussion of the meaning of *munitions de guerre* appears to have taken place. Similarly, although there took place during the Conference extensive discussions which are amply reported in the Acts of the Conference and in the daily reports returned by Sir A. Horsford to the Foreign Secretary, nothing appears to have been said by way of explanation or elaboration of the term. There is a similar absence of any discussion in the proceedings of the Institute of International Law prior to the adoption of the Oxford *Manual on the Rules of Land Warfare* in 1880, although the *Manual* follows closely the wording of paragraph 6 of the Brussels Declaration.<sup>3</sup> The *Manual* provides in Rule 55 as follows: 'Means of transport . . . telegraphs, stores of arms and munitions of war [*les dépôts d'armes et de munitions de guerre*]

<sup>1</sup> *Correspondence respecting the proposed Conference at Brussels*, Miscellaneous No. 1 (1874), Cmd. 1010, p. 12, reprinted in Lorimer, *op. cit.*, p. 344.

<sup>2</sup> *Annuaire*, vol. i (1877), p. 134, as translated in *Resolutions of the Institute of International Law* (ed. by Scott, 1916), p. 8.

<sup>3</sup> The relevant volume of the *Annuaire* of the Institute (vol. 5 (1882), pp. 150-6) contains a short report by M. Moynier, the Rapporteur, which indicates that he did circulate a draft with explanatory notes to the members of the Institute, but this is not reprinted. The only comment of relevance in the Report is (at p. 151) that he took as the basis of his work: (1) the Geneva Convention of 1864 and the St. Petersburg Declaration of 1868; (2) The draft of additional articles to the Geneva Convention, 1868; (3) the Draft Brussels Declaration of 1874, together with the opinions on it expressed by the Institute in 1875; (4) The French, Dutch and Russian military manuals; and (5) Lieber's Code. It must be assumed, therefore, that in employing the expression *munitions de guerre* he did not intend to depart from such meaning as it might have had in the earlier drafts. Earlier consideration of the subject by the Institute is reported in *Revue de Droit International*, 7 (1895), pp. 438 ff., esp. at p. 480.



may be seized by the occupier, notwithstanding that they belong to individuals or companies; but they must be restored if possible at the conclusion of peace, and compensation for the loss inflicted on their owners must be provided.' Finally, although the successive drafts which were considered at the Hague Conference in 1899 underwent changes in passages in which the expression was used, nothing was said that provides any conclusive evidence as to what the participants had in mind.

This uniform absence of elaboration may not be entirely devoid of significance. The fact that nothing was said about *munitions de guerre* suggests that there was no doubt about the meaning of the expression. Nevertheless, there still remains the problem of ascribing some specific content to the term. It is necessary, therefore, to examine such indirect evidence as may be found both in the wording of the relevant texts and in the course of the debate on the whole subject of the treatment of private property in occupied territory. If paragraph 6 of the Brussels Declaration is approached in this way, there are two comments which may be made upon it. The first is that if the *ejusdem generis* rule of interpretation were applied to the paragraph, it would seem that the element common to railway rolling stock, dépôts of arms and munitions of war, and which might be taken as constituting them a 'class', is that of immediate and effective utility in hostile operations. The second comment—which provides support for the first—is based upon the change which was made in the text of paragraph 6 between the first draft and the final draft. In the first draft the enumerated items are merely stated to be 'subject to seizure by the army of occupation', while in the final draft they are stated to be 'likewise materials which may serve for military operations and which cannot be left by the army of occupation at the disposal of the enemy'. In the absence of any other adequate explanation in the available Reports of the Conference of the change in language between the original and the final drafts, a likely explanation of the change is that what the Conference had clearly in mind was that the purpose of the seizure was to prevent an enemy from being able to make use of the material left behind by the retreating Occupant in the immediate furtherance of the military campaign. The only comment in the report by the British delegate, Sir A. Horsford, is that 'the German delegate laid down the general principle that when it is necessary to seize the property of private individuals, the appropriation must be of a temporary character'.<sup>1</sup> While it is not necessarily true to say that all material which could be used in this way is necessarily *munitions de guerre*, there is a strong inference that nothing is *munitions de guerre* that cannot be so used.

Indeed, the general impression which is left by a perusal of the

<sup>1</sup> Miscellaneous No. 1 (1875), p. 24.

proceedings<sup>1</sup> of both the Brussels and the Hague Conferences is that while the delegates were considering the law of belligerent occupation in the light of conditions of war substantially different from those prevailing more recently, they nevertheless envisaged *munitions de guerre* as being a term of art descriptive in a general way of weapons and other movable objects which could readily be employed in battle and of which it was necessary to deprive the re-conquering authorities if the tide of battle was not immediately to be turned against the Occupant. For this reason it seems clear that they did not equate *munitions de guerre* with *war materials* or with anything that might generally be of use to a belligerent. They did not include within the conception of *munitions de guerre* real property or raw materials which would require processing of a costly, elaborate or lengthy character in order to make them suitable for use in war—despite the fact that when so processed they might be of the utmost value.

*Munitions de guerre in other contexts: the law of contraband.*—Some support for this assessment of the view prevailing in the second half of the nineteenth century is to be derived from an examination of the meaning attributed to the words *munitions de guerre* in the principal context in which they appear to have been used prior to the Brussels Declaration. They were thus used in the context of the law of contraband, where the expression had for long been resorted to in connexion with the description of articles condemned as absolute contraband. Indeed, this appears to be the earliest occasion on which the expression *munitions de guerre* was employed.<sup>2</sup> A French Ordinance of 1543 recognizes the right of neutral States to trade with the enemies of France, and employs the expression *munitions de guerre* to describe the only category of goods excluded from this licence; but the Ordinance does not define what is meant by these words.<sup>3</sup> The expression is

<sup>1</sup> The complete list of papers relating to the Brussels Conference is as follows: Miscellaneous No. 1 (1874); Miscellaneous No. 2 (1874); Miscellaneous No. 1 (1875); Miscellaneous No. 2 (1875); Miscellaneous No. 3 (1875). The most relevant paragraphs are to be found at pp. 245–6 of Miscellaneous No. 1 (1875).

<sup>2</sup> This is, of course, not the only other context in which the expression was employed. Reference may be made to the terms of Article V of the Suez Canal Convention of 1888: 'En temps de guerre, les Puissances belligérantes ne débarqueront et ne prendront dans le Canal et ses ports d'accès, ni troupes, ni munitions, ni matériel de guerre. . . .' Commercial. No. 2 (1889), C.-5623.

<sup>3</sup> The relevant article of the Ordinance as quoted in Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War* (2nd ed., 1875), pp. 242–3, provides as follows: 'Mais pourront nozdits alliez et confederez faire leur traficque par mere dedons navires qui soient de leur obeissance et sujection, et par leurs gens et subjects, sans y acceuillir nos ennemis et adversaires; lesquels biens et marchandises ainsi chargées ils pourront mener et conduire où bon leur semblera, pourveu que ce ne soient munitions de guerre dont ils vousissent fortifier nozdits ennemis; auquel cas nous avons permis et permettons à nos dits subjects les prendre et amener à nos ports et havres, et les dites munitions retenir selon l'estimation raisonnable, qui en sera faite par nostre dit admiral ou son lieutenant.' Similar words are used in Article 69 of the Ordinance of 1584. See Robinson, *Collectanea Maritima* (1801), p. 105, at p. 123. An Ordinance of Holland of the same year employs the words 'munitions de guerre' in a similar sense: *ibid.*, p. 160, n.



used again in the Treaty of Southampton of 1625 between England and the United Provinces. Article XX of the Treaty provides that 'all contraband merchandise, including munitions de bouche et de guerre, ships, arms, sails, ropes, gold, silver, copper, iron, lead, and similar articles' destined for Spain shall be lawful prize.<sup>1</sup> Although *munitions de guerre* are not defined, the fact that a distinction is drawn between them and *munitions de bouche* shows quite clearly that the former was not regarded as comprising the latter; and the fact that equipment for sailing vessels was specified while cannon, powder, shot and other weapons were not, suggests that the latter were clearly within the category of *munitions de guerre* but that the former was not.

It seems probable that the terms of the English Proclamation of 1626,<sup>2</sup> issued to give effect to this Treaty, may be read in a similar way. The Proclamation listed a large number of prohibited objects ranging from ordinance and arms of all sorts through cables and anchors to corn and grain; and the list concluded with the words 'and victualls of all sortes, all provisions of shipping and all munitions of war or of provisions for the same'. Here, again, there appears to be some recognition of a distinction between the three classes of goods: food, i.e. *munitions de bouche*; objects generally useful in war, such as naval stores; and munitions of war, such as ordinance and arms.

Later documents show even more clearly that *munitions de guerre* were regarded as descriptive of weapons and warlike articles. In the Treaty of Paris of 1655, concluded between France and the Hanseatic Towns, *munitions de guerre* are actually described as comprising 'canvass', muskets, mortars, bombs, petards, and other arms serving for war, together with horses, ropes, and canvas which can only be used for making sails.<sup>3</sup> Again, in the Treaty of St. Petersburg of 1766, it was provided that canvas, mortars, firearms, &c., exceeding the requirements of the vessel carrying them

<sup>1</sup> The original French text of Article XX provides: 'Toutes marchandises de contrebande, comme sont munitions de bouche, et de guerre, navires, armes, voiles, cordages, or, argent, cuivre, fer, plomb, et semblables, de quelque part qu'on les voudra porter en Espagne, et aux autres pays de l'obéissance du dit Roy d'Espagne et de ses adhérens, seront de bonne prise avec les navires et hommes qu'ils porteront'; Twiss, op. cit., p. 234.

<sup>2</sup> The Proclamation of 1626 was entitled 'A Proclamation to prevent the furnishing the Kinge of Spaine and his Subjects with provisions for Shippinge, or Munition for the Warres, and with Victualls.' The following is the list of prohibited objects: '... ordinance, arms of all sortes, powder, shott, match, brimstone, copper, iron, cordage of all kindes, hempe, saile, canvas, danuce pouldavis, dables, anchors, mastes, rafters, boate oars, balcks, capraves, deal board, clap board, pipe staves, and vessels and vessel staffe, pitch, tarre, rosen, okam, corne, graine, and victuals of all sortes, all provisions of shipping, and all munition of warr, or of provisions for the same . . .'; Robinson, op. cit., p. 63, at p. 65.

<sup>3</sup> Article XI of the Treaty of Paris provides: 'Lesquelles marchandises de contrebande sont entendues être munitions de guerres, armes à feu; scavoir, canons, mousquets, mortiers, bombes, pétards . . . et autres armes servans à la guerre, ensemble des chevaux, des cordages, et des toiles noyales, qui ne puissent servir qu'à faire voiles . . .'; Twiss, op. cit., pp. 253-4.

shall be deemed *munitions de guerre*.<sup>1</sup> In 1880, in Article 13 of the Convention which terminated the state of undeclared war between France and the United States, the parties concluded a long list of items which were to be treated as contraband, with the words 'and generally all kinds of arms, ammunition of war [*munitions de guerre*] and instruments fit for the use of troops'.<sup>2</sup>

That the term *munitions de guerre* was generally regarded in this narrow sense throughout the period of codification during the latter part of the nineteenth century is shown by the terms of the Resolution of the Institute of International Law adopted in 1896 on the subject of the 'International Regulation of Contraband of War'. 'Munitions of war [*munitions de guerre*] and explosives' are listed, together with arms of all kinds, military *matériel* and vessels fitted out for war, as being contraband. The Institute expressly limited the term *munitions de guerre* to those 'articles which, to be used directly in war, need only be assembled or combined'.<sup>3</sup> That term reappears, in this connexion, in Article 22 of the Declaration of London. Item 11 of the list of articles which may, without notice, be treated as absolute contraband comprises 'implements and apparatus designed exclusively for the manufacture of munitions of war [*munitions de guerre*], for the manufacture or repair of arms, or war material for use on land or sea'.<sup>4</sup>

*Munitions de guerre and Hague Conventions V and XIII.*—The fact that the words *munitions de guerre* had an accepted connotation in the law of contraband as meaning weapons and other objects which could be used

<sup>1</sup> Treaty of St. Petersburg, 1766, Article XI: 'Tous les canons, mortiers, armes à feu, pistolets . . . poudre, salpêtre, souffre . . . au-delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, ou au delà de celle qui doit avoir chaque homme servant sur le vaisseau ou passager, seront réputés munitions ou provisions de guerre. . . .'

<sup>2</sup> The Convention is printed in Scott (ed.), *The Controversy over Neutral Rights between the United States and France, 1797-1800* (1917), pp. 487-510.

<sup>3</sup> *Annuaire de l'Institut de droit international*, vol. 15, p. 231. An English translation of the Resolutions will be found in Scott (ed.), *Resolutions of the Institute of International Law* (1916), p. 129. The comments and discussions preceding the adoption of these Regulations at the Venice Session of the Institute are particularly interesting. In the original draft, contraband was defined simply as 'munitions de guerre . . . transportées par mer pour le compte ou à destination d'un ennemi' (p. 122). M. Perels objected to this definition on the ground that 'le même terme est employé aussi pour désigner une catégorie spéciale de contrebande à côté de plusieurs autres, à savoir les accessoires des armes'. To which M. de Montluc replied that 'la terminologie française admet réellement le mot "munitions" dans les deux sens (*lato sensu* et *stricto sensu*), et qu'il n'y a absolument aucun inconvénient à l'employer ainsi' (p. 117). Nevertheless, the former view prevailed, and by a vote of 10-5 the draft was amended (pp. 216-18).

<sup>4</sup> Pearce Higgins, *The Hague Peace Conferences* (1909), p. 546. It is of some significance that various States in their comments on the Memorandum prepared by the British Government as a basis for the deliberations of the London Conference emphasized the fact that absolute contraband consisted of articles 'which can without manipulation serve immediately for maritime or terrestrial armament'; see observations of Italy in Scott, *Declaration of London* (1919), p. 25; and of Japan, *ibid.*, pp. 25-26. The French view was that while petrol destined for the use of a war fleet or for a port of war might become contraband, that did not make petrol into munitions of war: *ibid.*, p. 29.



in hostilities without more processing than, possibly, that involved in assembling them, provides no conclusive evidence that the words were used in the same sense in the Hague Regulations. But the suggestion that that is in fact their correct interpretation is borne out by the provisions of other Hague Conventions. There are, in the first place, a number of instances in which the Hague Conventions use the words 'munitions' as referring to weapons. Thus in Article 2 of the Fifth Hague Convention, on the Rights and Duties of Neutral Powers in War on Land, the words '*munitions*' and '*approvisionnements*' are used to describe the classes of objects which belligerents are forbidden to move across the territory of a neutral Power.<sup>1</sup> Secondly, there are a number of situations in which the parties either used an expression other than *munitions de guerre* when they wished to refer to the wider concept of war material, or, indeed, even actually contrasted the two expressions. For example, Article 2 of the Ninth Hague Convention excludes certain places from the prohibition upon naval bombardment contained in Article 1. Those places are described as 'military works, military or naval establishments, dépôts of arms or war material [*dépôts d'armes ou de matériel de guerre*], workshops or plants . . .'.<sup>2</sup> A similar distinction is drawn in Article 6 of the Thirteenth Hague Convention between *munitions* and *matériel de guerre*.<sup>3</sup>

*Judicial decisions.*—The view that the expression *munitions de guerre* had a fixed and generally accepted meaning both at the time of the drafting of the Hague Regulations and subsequently is supported by the decisions of both international and municipal tribunals. If the suggestion that the term represented a concept with a content variable according to the exigencies of war were correct, we might expect to find in the numerous decisions which have been concerned with the validity of the acts of an Occupant in relation to property in occupied territory frequent and substantial reliance upon the terms of the second paragraph of Article 53. In fact, the number of cases in which reliance has been placed upon the second paragraph of Article 53 are few, and even they have tended towards a restrictive interpretation of the term *munitions de guerre*. It may be convenient, in the first place, to examine this latter category of cases and to turn, subsequently, to the cases in which reference might have been, but was not, made to Article 53.

<sup>1</sup> Hague Convention No. V, Article 2, provides: 'Il est interdit aux belligérants de faire passer à travers le territoire d'une Puissance neutre des troupes ou des convois, soit de munitions, soit d'approvisionnements'; Pearce Higgins, *op. cit.*, p. 282. '*Munitions*' is used in a similar sense in Article 7 of the same Convention and also in Article 7 of the Thirteenth Hague Convention: Pearce Higgins, *op. cit.*, pp. 283 and 448. On neutral embargoes on the export of munitions to belligerents, see Bluntshli, *op. cit.*, pp. 428-9, and Garner, *International Law and the World War*, vol. ii (1920), pp. 393-4.

<sup>2</sup> Pearce Higgins, *op. cit.*, p. 347.

<sup>3</sup> *Ibid.*, p. 447.

The cases in which express consideration was given to the content of the term *munitions de guerre* as used in the second paragraph of Article 53 are few: there appear to be only two decisions of municipal courts on the subject, and none of international tribunals. In the case of *Re Esau*,<sup>1</sup> decided by the Netherlands Special Court of Cassation, the accused was charged with the unlawful removal to Germany during the period of occupation of scientific instruments and a sum of gold. He pleaded that he was entitled to remove the materials because they were *munitions de guerre* and might be seized under the second paragraph of Article 53. The Court rejected this plea on the ground that goods would not constitute *munitions de guerre* simply because they would be of substantial assistance to the enemy in waging war. It said: 'Neither the text nor the history of Article 53 gave grounds for the thesis that the term "munitions de guerre" should be extended to material and apparatus such as boring machines, lathes, lamps, tubes and gold,' and even to other objects which however important they might be for technical and scientific research, are certainly not so closely connected with military operations that they must be deemed to be included among the goods exhaustively enumerated in Section 53, sub-section 2, and therefore to be withdrawn by way of exception from the inviolability of private property in land warfare.<sup>2</sup>

Similarly, in the case of the *Singapore Oil Stocks*,<sup>3</sup> the Court of Appeal in Singapore, after careful examination of the question, concluded that the extraction from the ground and the seizure of crude oil could not be justified as a seizure of *munitions de guerre* under the second paragraph of Article 53.<sup>4</sup> This decision is the more significant for the reason that there the Court found on the evidence that oil 'was the most vital war material at that time' and 'that the seizure of the appellant's oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied powers'.

Two reasons were given by the Singapore Court for its decision on this issue. In the first place, the Court distinguished between, on the one hand, such raw material and semi-manufactured products as cloth for uniforms

<sup>1</sup> *Nederlandse Jurisprudentie*, 1949, No. 438; *Annual Digest and Reports of Public International Law Cases*, 1949, Case No. 177.

<sup>2</sup> See *Annual Digest*, 1949, at p. 483.

<sup>3</sup> *N.V. de Bataafsche Petroleum Maatschappij and others v. The War Damage Commission* (1956), ~~as~~ yet unreported.

<sup>4</sup> In this respect the Court of Appeal overruled the decision of the Court below. The latter had said: 'Crude oil, in our opinion, is clearly ammunition of war under the Hague Rules and under Article 53 the Japanese were well within their right in seizing it.' See 'B', 'The Case of the Singapore Oil Stocks', in *International and Comparative Law Quarterly*, 5 (1956), p. 9.



and leather for boots, which could possibly be made up without the assistance of civilian technicians or the use of outside plant and, on the other hand, materials which required elaborate installations and a substantial degree of civilian assistance in order to be prepared for use in war. The first category of materials might possibly be regarded as 'having a sufficiently close connection with direct military use' as to constitute them *munitions de guerre* (though the Court refrained from expressly so deciding). On this aspect of the matter the Court found that crude oil fell into the second of these categories and, by reason of the elaborate preparation required before it was ready for use, could not be considered as *munitions de guerre*.

A second reason given by the Court for finding that crude oil was not *munitions de guerre* was that the crude oil had been seized *in situ* and was, therefore, according to the local law, an immovable. As such it was not susceptible of direct military use and was thus not *munitions de guerre*. In reaching this conclusion, the Court distinguished *munitions de guerre* from other objects specifically referred to in the second paragraph of Article 53, such as means of transport which, as in the case of a railway system, might partake of the character of realty.<sup>1</sup>

However, apart from these decisions which bear directly upon the meaning of the term *munitions de guerre*, there are a number of cases which show, at least indirectly, the limits of its content. Thus in the Norwegian case of *Johansen v. Gross*<sup>2</sup> it was held that a motor taken out of a motor-boat was not a means of transportation within the meaning of Article 53. If the expression *munitions de guerre* in the same Article could have been interpreted broadly to cover either war materials generally or at least objects which might be used in war, the Court would have been able to find the seizure justified by reference to that concept. The fact that it did not reach this conclusion raises a strong presumption that the Court did not consider that the engine of a motor-boat was *munitions de guerre*. The same point is illustrated by the Swiss case of *P. v. A.G.K. & P.*,<sup>3</sup> where the issue was whether the seizure by German forces in Poland of a calculating machine belonging to the Polish State could be justified. Since the property in question was public property, the test laid down in the first paragraph of

<sup>1</sup> The validity of this particular reason given by the Court may be open to some doubt. The mere fact that an object is an immovable does not necessarily render it unsuitable for use in military operations. Moreover, there is some authority for the view that rules of municipal law peculiar to the occupied territory should not be taken into account in determining whether or not a particular object is subject to seizure. See *French State v. Établissements Monmousseau*, *Annual Digest*, 1948, Case No. 197. It may also be noted in this connexion that the Singapore Court rejected the suggestion that an Occupant whose acts were contrary to the Hague Regulations might nevertheless acquire title by *specificatio*—a mode of acquisition recognized by the local law as being open to a wrongdoer.

<sup>2</sup> *Norske Rettstidende*, 1950, p. 326; *Annual Digest*, 1949, Case No. 176.

<sup>3</sup> See *Annual Digest*, 1948, Case No. 196.

Article 53 for determining whether it was subject to seizure was whether it might 'be used for operations of war'. There is some doubt whether the class of objects referred to by this expression is wider than or identical with that included in *munitions de guerre*, but in any event it cannot properly be construed as referring to a narrower class.<sup>1</sup> Nevertheless, the Swiss Federal Tribunal held that calculating machines do not fall within the category of movable property of the State which may be used for operations of war, even though the correspondence in the case showed that such machines were used by the armed forces.

Similar conclusions about the narrowness of the concept of *munitions de guerre* may also be drawn from the judgments of the Military Tribunals sitting at Nuremberg in the cases of *Goering and others*,<sup>2</sup> of *Krupp*,<sup>3</sup> of *Flick*,<sup>4</sup> of *Krauch*,<sup>5</sup> and of *Weizsaecker*.<sup>6</sup> In each of these cases the accused were charged with, *inter alia*, the unlawful seizure of property, either generally by way of what was termed 'economic exploitation' or 'plunder', or specifically by way of seizure of particular identifiable plant, machinery, materials, or products. In the *Flick* case, for example, the Tribunal held that the accused was responsible for the crime of 'spoliation' in that, *inter alia*, he distributed steel to Germany from the Rombach plant in Alsace-Lorraine. In the *Weizsaecker* case, the objects seized were textile materials and products. Yet, it is significant that in none of these cases does there appear to have been any reference, even on the part of the defence, to the possibility that the acts with which the accused were charged might have been justified as seizures of *munitions de guerre* under the second paragraph of Article 53 of the Hague Regulations. Indeed, in a statement which may be taken as representative of the reasoning employed in these cases, the Tribunal in the *Krupp* case said:

'... The reason why the Hague Regulations do not permit the exploitation of economic assets (except to the limited extent outlined) for the war effort of the occupant, are clear and compelling. If an economic asset which, under the rules of warfare, is not subject to requisition is nevertheless exploited during the period of hostilities for the benefit of the enemy, the very things result which the law wants to prevent, namely, (a) the owners and the economy as a whole as well as the population are deprived of the respective assets; (b) the war effort of the enemy is unfairly and illegally strengthened; (c) the products derived from the spoliation of the respective assets are being used, directly or indirectly, to inflict losses and damage on the peoples and property of the

<sup>1</sup> Huber, 'La propriété publique en cas de guerre sur terre', in *Revue générale de droit international public*, 20 (1913), refers to the objects which may be seized under Article 53 (1) in the following terms: 'Est saisissable tout objet qui par ses qualités naturelles est directement ou indirectement utilisable pour la guerre et qui en même temps, d'après sa condition juridique, doit ou peut être utilisé dans ce but' (at p. 657).

<sup>2</sup> See *Annual Digest*, 1946, Case No. 92.

<sup>3</sup> See *Annual Digest*, 1948, Case No. 214.

<sup>4</sup> See *Annual Digest*, 1947, Case No. 122.

<sup>5</sup> (*I.G. Farben Trial*): see *Annual Digest*, 1948, Case No. 218.

<sup>6</sup> (*Ministries Trial*): see *Annual Digest*, 1949, Case No. 118.



remaining (non-occupied) territory of the respective belligerent, or on the peoples and property of its allies. . . .'<sup>1</sup>

Lastly, there are a number of cases in which the legality of appropriations of property made by an Occupant has been tested solely by reference to Article 52 and without regard to Article 53 of the Hague Regulations. Moreover, this was done in situations in which, if *munitions de guerre* had been considered as synonymous with war material, there would have been no need to rely exclusively on Article 52 and in which, for that reason, the decision would have been different. This is so particularly in those cases, such as *Ralli Brothers v. German Government*,<sup>2</sup> where the appropriation was held unlawful for the reason that the property was requisitioned to satisfy needs other than those of the army of occupation. In that case a quantity of cotton and other goods belonging to the claimants was seized in Antwerp by German forces during the period 1914-16, was taken to Germany, and was there put at the disposal of the War Raw Material Department. The Tribunal held that the requisition constituted a violation of Article 52 of the Hague Regulations, saying: 'The encroachment which Rule 52 admits upon the private property which otherwise is to be respected is justified by the necessity of keeping up the occupying army. This army is permitted to requisition what it directly wants, and by altering the wording of the provision here applicable—as it stood in the corresponding Article of the Brussels Declaration—the first Peace Conference at the Hague have expressly and without a dissentient, shown their intention to limit the scope of Article 52.'<sup>3</sup>

*Writers and official military manuals.*—The fact that so few writers discuss specifically the meaning of the words *munitions de guerre* suggests that the expression was not considered as giving rise to any real problem. Even so usually acute a writer as Hall entirely disregards the possibility that the term may have any meaning wider than arms and ammunition.<sup>4</sup>

<sup>1</sup> See *Annual Digest*, 1948, Case No. 214, at p. 624.

<sup>2</sup> Decided by the Anglo-German Mixed Arbitral Tribunal: *Annual Digest*, 1923-1924, Case No. 244.

<sup>3</sup> Loc. cit., pp. 446-7. See also *Gros Roman et Cie v. German State*, *Annual Digest*, 1923-1924, Case No. 245, in which two boxes of printed wool muslin belonging to the plaintiffs were requisitioned by the German forces in Antwerp in 1916 and were sent to Germany. The Franco-German Mixed Arbitral Tribunal held that the requisition was not made for the purposes of the army of occupation. Similarly, the Italian Court of Cassation in *Scotti v. Garbagnati and Marconi*, *Annual Digest*, 1948, Case No. 203, held that the requisitioning by the German authorities of buildings for use as a workshop by an Italian firm engaged in export to Germany was a violation of Article 52. The Court said: 'There can be no doubt that the requisition of the premises was not connected with the satisfaction of the needs of the German troops in Italy. Consequently, it was contrary to the international rules relating to warfare on land and was clearly unlawful.' See also *Lucchesi v. Malfatti*, *Annual Digest*, 1946, p. 382, Note (requisition of a motor-car); *In re Shipbuilding Yard 'Gusto'*, *ibid.*, 1947, Case No. 132 (requisition of dredger); *Siuta v. Guzikowski*, *ibid.*, 1919-1922, Case No. 342; and *Secret v. Loizel*, *ibid.*, 1943-1945, Case No. 164 (requisition of horses).

<sup>4</sup> Hall, *International Law* (8th ed., by Pearce Higgins), pp. 569-70. The editor merely cites

Oppenheim's treatment of the problem appears to have varied between his draft of the relevant sections of the British *Military Manual*, for the preparation of which in 1912 he was responsible, and the relevant paragraphs of his textbook. In the latter, under a marginal note 'Private War Material and Means of Transport', he states that 'All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth for uniforms, leather for boots, saddles, and also all appliances . . . which are adapted for the transmission of news or for the transport of persons and goods, such as railway rolling stock, ships, telegraphs, telephones, carts, and horses, may be seized and made use of for military purposes by an invading belligerent. . . .'<sup>1</sup> In the *Military Manual*, on the other hand, he excludes leather for boots and cloth for uniforms from the items which may be seized under Article 53 and states that they fall under Article 52 and may be taken only for the needs of the army of occupation.<sup>2</sup> Ferrand, a French author who devotes a whole volume to a consideration of the right of an Occupant to requisition or seize private property, does not devote any space at all to a consideration of the meaning of the term.<sup>3</sup> Rolin, in the principal French treatise on the law of war, appears to identify *munitions de guerre* with arms and ammunition.<sup>4</sup>

To the extent that the matter appears to have been considered by authors there seems to be general agreement on at least two factors relevant to the determination of the content of *munitions de guerre*. The first of these two factors, which are closely connected, is that the object seized should be capable of being of 'direct use in war'. The second factor is that the object must be of such a nature that if it were left behind by an Occupant it would be likely to lead to a prolongation of the war. Dr. Spaight's view on the subject may be quoted in full:

'It must be borne in mind that under the Hague Article LIII, second paragraph, certain kinds of private property are subject to seizure on the principle that they may be applied to warlike purposes and may therefore be taken by a belligerent for his own immediate use or to keep them from being used by the enemy. They are things of such a nature that they cannot safely be left at large, as it were, in time of war. It is a natural precaution for an invader to sequester warlike instruments which might be used against him; he may quite properly order the inhabitants of an occupied district, e.g. to deliver up their arms or he may remove private stocks of dynamite or gun-cotton. But any extension of the practice of sequestering private property is fraught with danger.'<sup>5</sup>

Article 53 in a footnote, without comment. Stone, *Legal Controls of International Conflict* (1954), in his treatment of Article 53 (2) does not appear to consider that any difficulty is likely to occur in connexion with the words *munitions de guerre* (see p. 706).

<sup>1</sup> *International Law*, vol. ii (7th ed., by H. Lauterpacht, 1952), p. 404. The passage has remained unchanged since the first edition.

<sup>2</sup> See Edmonds and Oppenheim, *Land Warfare* (1912), p. 90. In this he is followed by Stone, *op. cit.*, p. 707. <sup>3</sup> Ferrand, *Des réquisitions en matière de droit international public* (1917).

<sup>4</sup> Rolin, *Le Droit moderne de la guerre*, vol. i (1920), p. 537.

<sup>5</sup> *War Rights on Land* (1912), p. 200.



Despagnet elaborates the second of these factors in a way which suggests that he considered the seizure of *munitions de guerre* to be a measure of precaution against their use as much by the local population as by the returning forces of the lawful sovereign.<sup>1</sup> The position is put most clearly by Bluntschli when, after enumerating certain objects such as canons, powder, and uniforms which may be seized as *munitions*, he says: 'All these objects, being immediately usable in military operations and for the needs of the army in the field, are by their nature and object exposed to the risks of war. One considers as flowing from this the right of the occupant to take them from his enemy and to apply them to his own needs.'<sup>2</sup>

*The problem of raw materials.*—Only one modern authority makes any specific comment upon the content of the term *munitions de guerre* and, in so doing, he touches upon one of the more acute problems involved in the definitions of the term. He says: 'Raw materials and semi-manufactured products necessary for war production can hardly be regarded as munitions of war.'<sup>3</sup> If (which is believed to be the case) this statement is correct, then it raises the problem of how, if at all, an Occupant is lawfully to obtain raw materials from an occupied territory for the promotion of his general war effort outside the territory. If such materials cannot be seized under Article 53, they can no more be requisitioned (having regard to the intention to use them for needs other than those of the army of occupation) under Article 52.<sup>4</sup> The question, thus put, is relevant because, if there is no way in which an Occupant can obtain such materials, then the gap between the interpretation of the term *munitions de guerre* and the exigencies of the military situation may be so wide as to suggest that the narrow interpretation of the term may be wrong.

The solution of the problem appears to lie in the general recognition of the fact that there is nothing in the Hague Regulations which prevents the owner of property from making a voluntary sale.<sup>5</sup> In other words, if an Occupant requires raw material for use outside the occupied territory, he must buy it. Difficulties may arise if the owner is absent or is unwilling to sell. In the former case, the appropriate course would appear to be for the

<sup>1</sup> *Droit International Public* (4th ed., 1910), p. 915.

<sup>2</sup> 'Du droit de Butin en général et spécialement du droit de Prise Maritime (Pt. I)', in *Revue de droit international*, 9 (1877), p. 508, at p. 546. Bluntschli also emphasizes that the basis of such seizures is to deprive the enemy of something which may be valuable to him. 'La nécessité militaire suffit donc pour expliquer et justifier cette saisie': loc. cit.

<sup>3</sup> See Castren, *The Present Law of War and Neutrality* (1954), p. 236.

<sup>4</sup> During the American Civil War, cotton was considered by the Federal Government to be subject to capture, not because it might be *munitions de guerre*, nor because it might be owned by the Confederate Government, but because, as Wheaton explains, 'it was such that it ministered directly to the strength of the enemy . . . and enabled him to supply himself with the munitions of war and to continue the struggle': Wheaton's *International Law*, vol. ii (7th ed., by Keith, 1944), p. 249. But it is doubtful whether that would now be accepted as good law.

<sup>5</sup> See Jessup, 'A Belligerent Occupant's Power over Property', in *American Journal of International Law*, 38 (1944) p. 457, at p. 460.

Occupant to appoint a custodian of absentee-owned property who could act as a trustee for and in the best interests of the absent owner and who would, on behalf of the owner, collect payment from the Occupant. If, however, the owner is not absent, but refuses to sell to the Occupant, the position becomes more complicated. There may, of course, be circumstances in which the refusal of an owner to sell to the Occupant would have such serious effects upon the whole national economy as to require the Occupant compulsorily to purchase the property if he is to discharge his duty under Article 43<sup>1</sup> of the Hague Regulations of maintaining order in the territory. Such a situation might arise, for example, in areas where the extraction of minerals constituted the sole or principal occasion for the employment of labour. However, where such circumstances do not exist, the situation would appear to be that an Occupant is not entitled compulsorily to purchase the raw materials he seeks.

*Considerations of principle and the scope of munitions de guerre.*—It may be asserted that having regard to the power of an Occupant and the compelling character of his requirements in modern warfare, the existing position is not entirely satisfactory. However, it is extremely doubtful whether these factors can be permitted to alter the legal position. Possibly, they may lead an Occupant to disregard legal niceties; possibly, even, they may show that the present condition of the law is unsatisfactory; possibly, they may show that it is absurd to treat *munitions de guerre* as a narrow concept and thus exclude the possibility of a lawful seizure. Of these possibilities only the third need be discussed. It raises clearly the issue of the extent to which considerations of convenience should override the weight of existing authority on the meaning of *munitions de guerre*. Assuming, for the moment, that the expression must be given a narrow meaning, is that interpretation compatible with the conditions and requirements of modern warfare?

In the first instance, the fact that the latter question may have to be answered in the negative may not itself constitute a sufficient ground for a tribunal to disregard, in the absence of general agreement among States, the rule laid down in the Hague Regulations. Whether the Hague Regulations be regarded as declaratory of customary international law or as depending for their legal validity upon their incorporation in a treaty is for this purpose irrelevant. They represent the existing law and, as the Tribunal said in the *German High Command Trial*, 'we might wish the law were otherwise, but we must administer it as we find it'.<sup>2</sup>

<sup>1</sup> Article 43 provides as follows: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

<sup>2</sup> *Law Reports of Trials of War Criminals*, vol. 12 (1949), p. 84. The Tribunal in the case of *Krauch*



However, even if the courts were entitled to revise the law in the light of their own assessment of the changing needs of the situation, it is believed that there would be no adequate justification for adopting the wider as against the narrower view of *munitions de guerre*. Bearing in mind the right of an Occupant to purchase raw materials and other commodities which do not fall within the category of *munitions de guerre*, there would remain only one situation in which he would require the right to seize such property: that would be the case if the owner refused to sell in circumstances which would not justify a compulsory purchase. As against this comparatively remote possibility, there are considerable and clear risks which attend the adoption of the wider view of *munitions de guerre*. If an Occupant can seize raw materials and war materials generally under Article 53, there would be no need for him ever to requisition materials under Article 52. Yet that possibility cannot have been intended by the draftsmen of the Hague Rules; and the fact that they inserted Article 52 shows clearly that they did not recognize that possibility as a lawful one. Again, if an Occupant can seize whatever he chooses to consider to be war material, where is the line to be drawn between the articles which are and those which are not such materials? According to current concepts, would not food, clothing, fuel, currency, and medicaments be considered as *munitions de guerre*? If the test to be applied is whether the commodity assists the army to make war, food and clothing both satisfy its requirements. And if food and clothing are *munitions de guerre* and may be seized in quantities not required for the immediate needs of the army of occupation, then the protection accorded to the individual becomes somewhat nominal.

Nevertheless, this line of reasoning, which is primarily directed towards the protection of the inhabitants of the occupied territory, is not free from difficulties, especially when consideration is given to the problem of the right of an Occupant to seize factories and plant which may be used for the purpose of war production. Clearly, for the reasons already given, the Occupant is not entitled to seize such plant, dismantle it and ship it back

*and others* made the following observations on the contention that 'total war' had overridden the Hague Regulations: 'It is further said that the Hague Regulations are outmoded by the concept of total warfare; that literal application of the laws and customs of war as codified in the Hague Regulations is no longer possible; that the necessities of economic warfare qualify and extinguish the old rules and must be held to justify the acts charged in keeping with the new concept of total warfare. These contentions are unsound. It is obvious that acceptance of these arguments would set at nought any rule of international law and would place it within the power of each nation to be the exclusive judge of the applicability of international law. . . . As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles. But we are unable to find that there has been a change in the basic concept of respect for property rights during belligerent occupation of a character to give any legal protection to the widespread acts of plunder and spoliation committed by Nazi Germany during the course of the Second World War.' *Ibid.*, vol. 10, p. 48.

to his home State.<sup>1</sup> Nor can he, without seizing it, compel the owners, manager, and employees to operate it on his behalf, for this would amount to a requisition of services requiring those concerned to make war upon their own country—a course prohibited by Article 52.<sup>2</sup> It is just possible that for the same reasons relative to the preservation of the local economy, which operate in the case of the compulsory purchase of raw materials, the Occupant might be able to justify his actions by reference to his obligation under Article 43 of the Hague Regulations to maintain good order.<sup>3</sup> But, if he cannot do this, is he entitled to take over and use the plant if the owners are unwilling that he should do so? There is nothing in Article 52 that allows an Occupant to act in this way; nor is there anything in Article 53, unless a factory which manufactures *munitions de guerre* can itself be regarded as falling within the same category as its products. For this proposition some slight support may be found in the suggestion made by Mérignhac and Lémonon that an Occupant might seize the resources of the factories at Creusot, Essen, and Birmingham (which, at that time, were the principal centres for the manufacture of arms).<sup>4</sup> It might also be said that the fact that the second paragraph of Article 53 recognizes the right of an Occupant to take over the enterprise of a railway means that the Occupant is not restricted in his right of seizure to objects of a strictly movable character.<sup>5</sup> On the other hand, as against the authority of Mérignhac and Lémonon there are indications in the treatises of Mérignhac<sup>6</sup> and of Pearce Higgins<sup>7</sup> that the right of the Occupant extends only to the seizure of the manufactured contents of such factories. Moreover, there is no reason why the fact that the words 'appliances adapted for transport' can be construed to include the whole enterprise of a railway should also mean that the term *munitions de guerre* includes enterprises which manufacture such munitions. Indeed, there is authority to the contrary. During the First World War, the seizure and dismantling by Germany of factories in Belgium was made the subject of a protest by

<sup>1</sup> See Lew, 'Manchurian Booty and International Law', in *American Journal of International Law*, 40 (1946), p. 584.

<sup>2</sup> See Ferrand, *op. cit.*, pp. 61–62: '... il ne saurait être question de contraindre les chefs d'usine ou leurs ouvriers à fabriquer pour l'ennemi des objets d'armement, canons, fusils, mitrailleuses, sabres, gabions, sacs à terre pour revêtement de tranchées, etc., des munitions, ou à réparer des armes endommagées'; see also Mérignhac and Lémonon, *Droit des gens et la guerre de 1914–1918*, vol. i (1921), p. 578.

<sup>3</sup> It was argued at the *I.G. Farben Trial (In re Krauch and Others)* that the acquisition by Farben of controlling interests in French plants could be justified on this ground. The Tribunal rejected this argument on the ground that the evidence indicated that it was the intention to enrich Farben: 'If the management had been taken over in a manner that indicated a mere temporary control or operation for the duration of the hostilities, there might be some merit in the defence.' *Law Reports of Trials of War Criminals*, vol. x, p. 50.

<sup>4</sup> *Op. cit.*, p. 608.

<sup>5</sup> See Rolin, *Le droit moderne de la guerre*, vol. i (1920), § 523.

<sup>6</sup> *Traité de droit international public*, vol. iii, Part I (1912), pp. 472–3.

<sup>7</sup> *War and the Private Citizen* (1912), p. 61.



the Belgian Government based on the terms of the second paragraph of Article 53.<sup>1</sup> Were it possible to extend the term to cover factories and their equipment, there would be no good ground for excluding from it the raw materials which are to be used in such factories; but this is an extension which, for reasons already stated, is not permissible.

Nevertheless, to suggest that because the term *munitions de guerre* does not include this class of enterprise, the Occupant is, as a result, forced into the position of having either to act unlawfully or to renounce a valuable instrument for the promotion of his own effort, is to emphasize (at least by implication) only one of the grounds on which his action would be unlawful. The reason for the illegality of the action of the Occupant in seizing a factory producing *munitions de guerre* is not merely that the factory itself is not subject to seizure, but that the factory could not be run without, in effect, requiring the population to take part in the operations of war against their country. The simple issue of the legality of the seizure of the plant itself could arise only if it was to be substantially staffed by persons of the nationality of the Occupant. In these circumstances, uncomplicated by the problem of the requisition of services, the only question would be the propriety of the seizure of the plant. But circumstances of that kind are probably far removed from the realities of the law of belligerent occupation. It is not necessary, by reference to them, to say that a narrow definition of the concept of *munitions de guerre* states the law in a form which leads inevitably to its breach.

*The protection of the population of the occupied territory.*—There remains for consideration the question of the practical importance of determining in a restrictive manner, as attempted in the present article, the content of the expression *munitions de guerre*. After all, it may be suggested, even if that expression is widely interpreted, the owner of property has nothing to lose. He is protected by the requirement that the property be restored and indemnities be fixed at the conclusion of peace—a condition which probably does not differ greatly in its substantive effect either from the conditions in Article 52 which require payment of compensation or from the price which is an essential element in a sale, whether voluntary or compulsory.

Subject to the possibility that there may be some difference between the standards of payment envisaged in relation to requisitions, seizures and purchases (as the case may be), there appears to be some persuasive force in the contention thus advanced. At the same time, that argument is open to objection on the ground that it unduly emphasizes the element of pecuniary compensation at the expense of the considerations which led to the decision embodied in the Hague Regulations that the acquisition of

<sup>1</sup> Referred to in Garner, *op. cit.*, vol. ii, p. 125.

property in certain circumstances would be lawful, while in others it would not. If the draftsmen of the Hague Regulations and their precursors had intended that an Occupant should be entitled to take, against reasonable payment, any property situate in the occupied territories, there would have been no need for them to subject the exercise of his powers under Article 52 to the condition that the goods requisitioned be only for the needs of the army of occupation.<sup>1</sup> The insertion of this requirement raises a very strong presumption that the legality of the acquisition of property by an Occupant was not considered to be dependent entirely upon questions of monetary compensation.

There are other considerations besides the apparent intention of the draftsmen of the Hague Regulations which should be taken into account in this connexion. Belligerent occupation is essentially a temporary affair. For that reason, an Occupant is not entitled to diminish or retard the prospects of the economic recovery of the territory by draining it of its resources of minerals and raw materials on the pretext that they constitute *munitions de guerre*. It is this factor which underlies, for example, the limitation of the powers of an Occupant in respect of public immovable property to the rights of an usufructuary and no more.<sup>2</sup> Nor is the Occupant entitled to subject the civilian population to privations by taking away from them food and clothing in quantities which leave them insufficient to satisfy the necessities of life.<sup>3</sup> Actual payment of a price or promise of the ultimate payment of compensation or indemnities is, in such circumstances, an irrelevant factor in determining the legality of the actions of the Occupant.

*Munitions de guerre and contraband.*—Something should, perhaps, be said of the relation between the terms *munitions de guerre* and 'contraband of war'. One of the factors which has contributed to the tendency to ascribe an extended meaning to the former term is that it has been made the subject of comparison with the concept of contraband. In some respects this comparison is accurate. Both are expressions which refer to a changing body of commodities. Of both it may be said, as it was said by Chitty in

<sup>1</sup> The exceptional nature even of a requisition under Article 52 is emphasized by Mérignhac and Lémonon, *op. cit.*, vol. i, p. 569.

<sup>2</sup> Article 55 of the Hague Regulations provides as follows: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.'

<sup>3</sup> The limitations upon the power of an Occupant which flow from the interpretation of *munitions de guerre* suggested in this article are strengthened, at least in respect of foodstuffs and medical supplies, by the express prohibition in Article 55 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 of the requisitioning 'of foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account'.



relation to contraband, that 'it is the *usus bellici* which shifting from time to time, make the law shift with them'.<sup>1</sup>

Beyond this point, however, it is not helpful or, indeed, accurate to push the comparison. Both may be terms with a changing content; but they are not identical, and the changes in their content, though made as a result of similar pressures and developments, have not been identical. The distinction between the rules relating to the treatment of property at sea and on the land has long been recognized.<sup>2</sup> It is equally well established that the rights of belligerents in relation to property at sea are much more extensive than their rights over property on land. Contraband, as descriptive of all the commodities which may be lawfully seized by a belligerent upon the high seas, is a wider concept than *munitions de guerre*. In particular, its greater elasticity consists in the fact that anything is contraband which may be of use for the support of the enemy's forces. When the words 'military use' are employed to describe the purpose to which contraband articles are directed, they refer to the general maintenance of such forces, not to the readiness with which such objects may be used in battle.<sup>3</sup> Kent describes the law of contraband in relation to neutrals as 'the prohibition to furnish the belligerent parties with warlike stores, and other articles which are directly auxiliary to warlike purposes'.<sup>4</sup> This being the character of contraband, the fact that fuel, food, and clothing may be held to be within the category in no way establishes that these same items are *munitions de guerre*.

### Conclusion

In view of the foregoing considerations, the definition of the expression *munitions de guerre* is a matter of importance if it is not to become one of the solvents of the rules and principles governing the treatment of property in occupied territory. The difficulties of definition in this sphere have

<sup>1</sup> See Chitty, *Law of Nations*, &c. (1812), pp. 119-20.

<sup>2</sup> For a detailed consideration of this distinction, see Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime*, vol. i (2nd ed., 1858), pp. 161-7. See also Kent, *op. cit.*, p. 241. In the course of the debates at the Brussels Conference in 1874, Baron Lambermont observed 'qu'on ne peut assimiler la contrebande de guerre sur terre à la contrebande de guerre sur mer'. Quoted, with approval, in Ferrand, *Des réquisitions en matière de droit international public* (1917), p. 175. And see Lord Simon in *Schiffahrt-Treuhand G.m.b.H. v. Her Majesty's Procurator-General*, [1953] A.C. 232, at pp. 261-2: '... the rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) while it remained the law of nations that captures at sea by naval forces were authorized. By 1781 a distinction between land-warfare and maritime-warfare in this respect was recognized. . . .'

<sup>3</sup> This is most clearly shown by the decision of Lord Stowell in *The Jonge Margaretha*, 1 C. Rob. 189, in which the fact that a cargo of cheese was found to be destined for the French naval base at Brest invested the cheese with a 'military use'. In the circumstances of the case, there was no question of the cheese being employed as a means of offence or defence.

<sup>4</sup> *Op. cit.*, 353.

rarely been better put than they were by Robert Ward in prefacing his consideration of those objects which might be deemed contraband:

‘Various indeed have been the attempts of many learned men to bind down its meaning by general maxims, founded in general principles of natural right. But, as far as I have been able to judge, they have attempted it without much success, on account of the radical difficulty of applying wide and extensive rules to what, from the force of the term, must always border upon something of particular specification. It is very possible, and very useful to illustrate general principles by practical examples: it is not always easy to explain doubts upon articles of convention, or in the nature of convention, by abstract theory or metaphysical division.’<sup>1</sup>

Perhaps the only general principle of any assistance to be derived from the authorities which have been considered is that the term *munitions de guerre* comprises such articles as can reasonably be employed in the actual conduct of hostilities. It is a truism that armies consist of individuals and that individuals have certain requirements of food, clothing, and amenities regardless of the nature of their occupation. Consequently, the mere fact that something can be, and is, used by an army does not mean that it necessarily falls within the class of *munitions de guerre*. Some additional factor is required. However, that additional factor is not that the commodity is fit only for exclusive use by an army or for purposes of offence or defence. Tank tracks, for example, may be equally suitable for use on bulldozers. Diesel oil will drive tractors as well as army lorries. Binoculars can be employed by explorers as well as patrols. Yet the fact that diesel oil, caterpillar tracks, and binoculars may have peaceful purposes does not deprive them, according to time and place, of the character of *munitions de guerre*. The essential element would appear to be that the object which is made the subject of seizure should, without substantial modification, be capable of playing a part in battle, in the sense either of causing or preventing physical injury to persons or military objectives. It is not necessary that it should, by itself, be capable of playing such a role; but it must, at least, be something which forms part of the necessary equipment of an instrument of attack or defence. Inevitably, an Occupant, under the stress of war, faced by shortages and possessing the power to enforce his own interpretation of his needs upon the population of the territory, tends to enlarge the category of objects which he conceives it his right to take. That tendency, however, is not one which, as the law now stands, the courts are entitled to take into account. In terms of existing law, Occupants, and any who seek to derive their title from them, act at their peril in relying upon asserted exceptions to the principle of immunity of private property as embodied in the Hague Regulations. It is possible that these principles may be destroyed by the abrasive effect of total war.

<sup>1</sup> Ward, *Rights and Duties of Belligerent and Neutral Powers* (1801), p. 174.



It is possible that they may be modified in the course of any future attempt to codify the law of war on a basis both more comprehensive and more modern than that of the Hague Regulations. But the existing law on the subject, as authoritatively expounded and judicially applied, is clear. An attempt has been made here to show that it is not unreasonable in its operation. The fact that it protects the individual amidst the calamities of war does not militate against its validity.

# DECLINE OF THE OPTIONAL CLAUSE<sup>1</sup>

By PROFESSOR C. H. M. WALDOCK, C.M.G., O.B.E., Q.C.

## § 1. *Introduction*

THE Optional Clause represents the compromise adopted at the First Assembly of the League of Nations to resolve the deadlock between those States which advocated that the jurisdiction of the proposed Permanent Court of International Justice should from the outset be made compulsory for all legal disputes and those which contended that the acceptance of the Court's jurisdiction should be left to the subsequent decision of each individual State.<sup>2</sup> The opponents of automatic compulsory jurisdiction, amongst whom were the Great Powers, let it be understood that they had it in mind, after signing the Statute of the Court, to enter into bilateral or multilateral treaties by which they would accept the Court's compulsory jurisdiction for specified classes of legal disputes *vis-à-vis* the particular parties to those treaties.<sup>3</sup> They were unwilling, however, in the Statute to commit themselves in advance either as to the classes of legal disputes or as to the States with respect to which they would bind themselves to accept the Court's jurisdiction. Their objection to arming the proposed Court, in the Statute itself, with a general power of compulsory jurisdiction over all parties to the Statute and for all legal disputes was thus both *ratione materiae* and *ratione personae*.<sup>4</sup> The compromise—the Optional Clause—was to give each party to the Statute the option, either at the time of signing or ratifying the Statute or at any time afterwards, to make a unilateral declaration by which, on the basis of reciprocity, it recognized the Court's compulsory jurisdiction and also the power to define the classes of legal disputes with respect to which the declaration was to apply.

In 1945 a similar divergence of opinion manifested itself in regard to the compulsory jurisdiction of the new International Court, and received the same solution. The Committee of Jurists, which prepared a draft of the new Statute for consideration by the San Francisco Conference, presented two alternative texts on the question of compulsory jurisdiction, one reproducing the Optional Clause and the other investing the Court automatically

<sup>1</sup> For the Optional Clause see Hudson, *Permanent Court of International Justice*, 2nd ed. (1943), pp. 449–82; Oppenheim, *International Law*, vol. ii (7th ed., by Lauterpacht, 1952), pp. 58–65; Lauterpacht in *Economica*, 10 (1930), pp. 137–72; Hambro in this *Year Book*, 25 (1948), pp. 133–53; Vulcan in *Acta Scandinavica*, 18 (1947–8), pp. 30–55.

<sup>2</sup> See Hudson, *op. cit.*, pp. 190–193.

<sup>3</sup> Cf. Sir Cecil Hurst (Great Britain), *Records of First Assembly* (1920), Committee 1, p. 380.

<sup>4</sup> See the discussion in the Committee of Jurists on reciprocity, *ibid.*, p. 312, especially the observation of M. Huber.



with compulsory jurisdiction for all legal disputes.<sup>1</sup> The Committee, without elaborating the point, drew attention to the possibility of mitigating the rigour of the second alternative by allowing States, as in the General Act of Geneva of 1928, to make a limited number of authorized reservations. Even so, and although the great majority of States at the San Francisco Conference were in favour of a general system of compulsory jurisdiction, its introduction proved to be impossible owing to the objections of the Soviet Union and the United States. Neither of these two States was at that time in a position to accept a Statute which invested the Court automatically with compulsory jurisdiction for legal disputes, and, since the Statute was to be an integral part of the Charter of the United Nations, insistence by the majority on a general system of compulsory jurisdiction would have excluded these two key States from the United Nations.<sup>2</sup> Accordingly, the optional system whereby each State individually makes its decision whether or not to accept compulsory jurisdiction was maintained in the new Statute.<sup>3</sup>

If there had been no Optional Clause in the Statute, it would still have been open to States gradually to develop the Court's compulsory jurisdiction by treaty, either bilateral or multilateral. Even with the Optional Clause, the primary method of accepting compulsory jurisdiction is by treaty, and the greater part of the Court's compulsory jurisdiction is derived from this source. As a rule, however, the compulsory jurisdiction derived from treaties is either limited to two particular States or, in the case of multilateral treaties, to a particular subject-matter. The importance of the Optional Clause is that it provides a simple means of accepting compulsory jurisdiction generally for all legal disputes and as against any State undertaking the same obligation. Its purpose was not merely to provide a possible basis for the judicial settlement of disputes, but also, through the multiplication of declarations by individual States, to promote between the parties to the Statute a general system of compulsory jurisdiction. The latter purpose has been achieved only to a very limited extent. The high-water mark of the Optional Clause jurisdiction of the old Court was in 1934, in which year no less than 42 States had declarations in force recognizing its compulsory jurisdiction under the Clause.<sup>4</sup> After that date, although some new States adhered, others allowed their declarations to

<sup>1</sup> United Nations Conference on International Organization (hereinafter referred to as U.N.C.I.O.), vol. xiv, pp. 667-8.

<sup>2</sup> Report of Rapporteur of Committee IV/1, U.N.C.I.O., vol. xiii, pp. 390-2.

<sup>3</sup> Moreover, it was provided in Article 36 (5) that declarations made under the old Statute and still in force should be deemed, as between parties to the new Statute, to be acceptances of the compulsory jurisdiction of the new Court for the period which they have still to run and in accordance with their terms.

<sup>4</sup> See Hudson, *op. cit.*, p. 473; according to Hudson these 42 declarations were equivalent to 861 bilateral agreements between the States concerned for the acceptance of compulsory jurisdiction.

expire, and the total number bound under the Clause gradually decreased. The experience of the new Court has been similar. In 1947, one year after its establishment, there were 25 States bound by the Optional Clause.<sup>1</sup> By 1952-3 this number had been increased to 37,<sup>2</sup> but the number has since decreased and the *Year Book* of the Court for 1954-5 shows only 32 States with effective declarations under the new Optional Clause.<sup>3</sup> Belgium, Bolivia, Brazil, Guatemala, and Iran have either cancelled their declarations or allowed them to expire. The historical record does not, therefore, justify any great optimism as to the possibility that by degrees the Optional Clause may bring about a general system of compulsory jurisdiction. Today, despite the almost universal support for compulsory jurisdiction at the San Francisco Conference, fewer than half the Members of the United Nations are adherents to the Optional Clause, and of these many have qualified their acceptances of the Optional Clause by the insertion of numerous limitations, reservations, and conditions in their declarations.

Even more disturbing is the increasing tendency on the part of States subscribing to the Optional Clause so to frame their declarations as to leave themselves largely free, when an actual dispute arises, to accept or decline jurisdiction as they think fit. The chief devices employed for this purpose are (1) time-limit clauses making the declarations terminable merely by notice to the Secretary-General of the United Nations, and (2) reservations by which it is sought to retain the right, by a future act effected after the declaration has come into force, to exclude from the acceptance of compulsory jurisdiction particular cases or categories of case at the will of the State concerned. The reciprocity prescribed by the Optional Clause, while it equalizes the position between States employing these devices and other States subscribing to the Clause, multiplies the prejudicial effect of the devices in undermining the system of compulsory jurisdiction. The object of the present article is, first, to focus attention on these devices; secondly, to examine the operation of the principle of reciprocity with respect to them; and thirdly, to point out that criticism of these devices, however well-founded in theory, must also take account of the really indefensible advantage given by the Statute and Rules of Court to States which prefer to stay outside the Optional Clause as against those which undertake its obligations. As a preliminary, however, to dealing with these matters, it is necessary to consider the freedom of a State to fix unilaterally the terms of its declaration under the Optional Clause, the nature of the juridical bond established between States by their declarations, and the meaning of the 'condition of reciprocity' contained in the Optional Clause.

<sup>1</sup> See *Year Book of the International Court of Justice*, 1946-7, pp. 221-8.

<sup>2</sup> *Ibid.*, 1952-3, pp. 171-82.

<sup>3</sup> *Ibid.*, pp. 189-200; Portugal also has since adhered to the Optional Clause.



§ 2. *The freedom to fix unilaterally the terms of declarations under the Optional Clause*

Paragraph 2 of Article 36 of the Statute—the Optional Clause—reads:

‘The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:<sup>1</sup>

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.’

As between any two States which have made declarations under the Optional Clause, their reciprocal obligation to accept the Court’s compulsory jurisdiction is constituted by the joining together of their two declarations through the Clause. Each is free to frame the terms of its declaration without consulting the other, and the fixed element in the legal relation between them is to be found in the Clause.

The fixed element in the Optional Clause itself, even under the new Statute, is comparatively small. In the old Statute a wide freedom of choice was deliberately left to the individual State in order to make it as easy as possible for States to subscribe to compulsory jurisdiction under the Clause. The idea was that, if a large number of States could be induced to make declarations, it would only be a matter of time before there was general acceptance of the principle of compulsory jurisdiction for all States. Accordingly, the old Statute in terms permitted acceptance of the compulsory jurisdiction of the Court *in all or any* of the four classes of legal disputes listed in the Clause. The Statute expressly envisaged the possibility of declarations being limited, for example, to disputes concerning ‘the interpretation of a treaty’ or ‘any question of international law’. With one exception, States did not in practice make use of this liberty to limit their declarations to one, or more, of the listed classes of legal disputes. The one exception was Iran, who limited her Declaration in 1930 to disputes with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Iran, that is, to the first of the classes of disputes listed in Article 36 (2).<sup>2</sup> The new Statute, however,

<sup>1</sup> The old Statute here read: ‘in all or any of the classes of legal disputes’, but the words ‘or any of the classes of’ were cut out of the new Statute at the San Francisco Conference; see below, p. 248.

<sup>2</sup> Indeed, Iran further limited her declaration by confining the applicable treaties or conventions to those subsequent to her declaration, and was on that ground held by the Court to be entitled to decline a judicial settlement of the *Anglo-Iranian Oil Company* case (*I.C.J. Reports*, 1952, p. 93).

appears to exclude the possibility of making a declaration which does not comprise all the four listed classes of legal disputes. In the new text of Article 36 (2) the words 'or any of the classes of' have been omitted from the phrase 'in all or any of the classes of legal disputes concerning', &c. The change of wording, which was made not in the Committee of Jurists but in a sub-committee of the San Francisco Conference,<sup>1</sup> was deliberate and was explained as being 'favourable to the jurisdiction of the Court, *since it eliminates the distinctions which the present text seems to make*'. Accordingly, it now appears that a declaration must *at least purport to embrace all the four listed classes of legal disputes* even though it may still be open to a State, by the insertion of conditions and reservation, to retract from these listed classes very large categories of matters. On this basis a declaration similar to the Iranian declaration of 1930 seems now to be incompatible with the Statute.<sup>2</sup>

Paragraph 3 of Article 36 of the new Statute, repeating a similar paragraph of the old Statute, adds a rider to the Optional Clause which provides:

'The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.'

But the fact that Article 36 specifically permits the inclusion of a condition of reciprocity on the part of designated States and of a limit upon the duration of the declaration does not mean that other forms of reservation, limitation, or condition are excluded. It seems from the first to have been recognized that the Optional Clause authorizes the making of any reservations, limitations, or conditions which are not incompatible with the basic provisions of the Statute. Thus, in 1921 the Netherlands confined its declaration to future disputes, and excepted disputes in regard to which the parties had agreed to have recourse to another form of peaceful settlement, although Article 36 made no mention of either exception. The League of Nations, with the object of encouraging adherence to the Optional Clause, actually drew attention to the possibility of making reservations.<sup>3</sup> In 1929 the United Kingdom made a declaration containing a limitation *ratione temporis*, three express reservations, and a condition.<sup>4</sup> The United Kingdom's example was followed in numerous other declarations and it was never suggested in any case either by the parties or by the Court that such limitations, reservations, or conditions were open to objection under the terms of the Statute. In short, it was a recognized interpretation of the

<sup>1</sup> U.N.C.I.O., vol. xiii, pp. 557-8.

<sup>2</sup> The Iranian declaration itself continued in force in virtue of paragraph 5 of Article 36, which maintained declarations made under the old Statute *in accordance with their terms*. Iran, however, has since terminated her declaration.

<sup>3</sup> *Records of the Fifth Assembly*, Third Committee, p. 199.

<sup>4</sup> For the text of the declaration see Hudson, *op. cit.*, p. 680.



Statute that States had an inherent right to qualify their acceptance of the Court's jurisdiction under the Optional Clause by limitations, reservations, and conditions.

The White Paper<sup>1</sup> presenting the United Kingdom's 1929 declaration to Parliament explained that Article 36 had been regarded as admitting any kind of reserve or exception 'because the jurisdiction of the Court may be accepted "in all *or any*" of the classes of legal disputes enumerated'. The reason why Article 36 was interpreted in this way seems, however, to have been the broader one which has been indicated above. The fundamental purpose of the Optional Clause being to encourage the acceptance of jurisdiction by unilateral act, it was assumed that each State possessed a wide liberty to fix for itself the limits of the jurisdiction to which it was willing to submit. At any rate, despite the deletion of the words '*or any*' from the new text of the Optional Clause, the same freedom to make reservations undoubtedly exists under the new Statute. The subcommittee of the San Francisco Conference which, by making this change in the Optional Clause, withdrew the right to pick and choose amongst the four enumerated classes of legal disputes, emphasized that the right to make reservations is inherent in Article 36:<sup>2</sup>

'As is well known, the Article has consistently been interpreted in the past as allowing States accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has, therefore, been considered unnecessary to modify paragraph 3 in order to make express reference to the right of States to make such reservations.'

Accordingly, while it is no longer open to a State, in accepting compulsory jurisdiction under the Optional Clause, to differentiate between the classes of legal disputes listed in the Clause, it may still, in other ways, differentiate between the categories of disputes with respect to which it accepts the Clause. It may still, by limitations, reservations, and conditions, except large categories of disputes from its acceptance of compulsory jurisdiction.

As to time-limits on the duration of declarations, which are expressly authorized by Article 36 (3) of the Statute, States have interpreted the authority to make declarations 'for a certain time' as giving them complete freedom in limiting the duration of their declarations.<sup>3</sup> Only ten States set no time-limit to their declarations, and the remainder have adopted a variety of forms of time-limit. Some have simply made their declarations for specific periods of 5, 10, or 15 years and have then either renewed them or allowed them to lapse. Others have made their declarations terminable on 6 or 12 months' notice to the Secretary-General of the

<sup>1</sup> Misc. No. 12 (1929), Cmd. 3452.

<sup>2</sup> U.N.C.I.O., vol. xiii, p. 558.

<sup>3</sup> See Hudson, *op. cit.*, pp. 472-3; see also the texts of declarations under the new Statute in the *Year Book of the International Court of Justice*, 1954-5, pp. 189-200.

League/United Nations, or even immediately on notice to the Secretary-General. Others, yet again, combining the two main forms, have made their declarations for a period of 5 or 10 years and thereafter until notice of termination is given to the Secretary-General. The differing periods for which declarations are current raise awkward questions of reciprocity which will be discussed later.<sup>1</sup>

The fixed element, it has been said above, in the reciprocal obligation established between two States by their unilateral declarations is the Optional Clause. The Clause does not, however, stand by itself. It forms an integral part of the Statute which governs the exercise of all the Court's jurisdiction. Accordingly, quite apart from paragraphs 3, 4, and 5 of Article 36, which specifically relate to declarations under the Optional Clause, all the provisions of the Statute, so far as they have any bearing on the Court's contentious jurisdiction, are necessarily brought into the agreements established between States by adherence to the Optional Clause. For example, the rules as to the appointment of a judge *ad hoc*, the right of other parties to the Statute to intervene in a case, and the power of the Court to decide any dispute as to its jurisdiction, are automatically incorporated into the obligation accepted by a State making a declaration under the Clause. Moreover, the bulk of the statutory provisions which are thus incorporated into the obligation established between States under the Optional Clause appear to have a fixed content, since they form part of the settled constitution of the Court. It does not appear to be open to States in their unilateral declarations, any more than in their Special Agreements, to make their acceptance of jurisdiction conditional upon the non-application of constitutional provisions of the Court's Statute. The Court is required both by Article 92 of the Charter and Article 1 of the Statute to function in accordance with the Statute. Indeed, the old Court, even though it was not bound by such an express injunction to observe the Statute, held in the *Free Zones* case<sup>2</sup> that it had no power to depart from the terms of the Statute on the proposal of the parties to a case. The Optional Clause, therefore, although it leaves to the individual State a large discretion as to the terms on which it accepts compulsory jurisdiction, does not permit a State to make a declaration which is incompatible with the fixed constitutional provisions of the Court's Statute.<sup>3</sup>

### § 3. *The nature of the juridical bond under the Optional Clause*

M. Fernandez of Brazil, when he first suggested an option as a means of resolving the deadlock on the issue of the voluntary or compulsory nature

<sup>1</sup> See below, pp. 278-9.

<sup>2</sup> *Free Zones of Upper Savoy and the District of Gex* (1929), *P.C.I.J.*, Series A, No. 22, p. 12.

<sup>3</sup> The rigidity of the Statutory provisions, of course, extends only to those provisions which are categorical in form and do not allow a measure of choice to the State or States concerned.



of the Court's jurisdiction, proposed that the jurisdiction Article of the Statute should have two alternative versions, one providing for a compulsory and the other for a voluntary system of jurisdiction.<sup>1</sup> On adhering to the Statute, a State would simply specify which version of the Article it subscribed to. If this proposal had been adopted, the juridical bond linking the States which subscribed to the compulsory version would have been an ordinary treaty obligation resulting from their common acceptance of a fixed treaty provision. The Assembly of the League, however, preferred to maintain a single text of the jurisdiction Article, voluntary in form, and in a special clause to provide what was really an additional Protocol of Compulsory Jurisdiction to which States could separately adhere by an independent and unilateral act.<sup>2</sup> The Assembly's formula was, perhaps, more scientific than that of M. Fernandez, but it also involved a more complicated form of juridical bond between the States which subscribed to the Court's compulsory jurisdiction.

States subscribing to the Optional Clause 'declare that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other State accepting the same obligation*, the jurisdiction of the Court in all legal disputes', &c. These declarations undoubtedly constitute 'international engagements' binding on the State concerned in relation to any other State also making a declaration under the Optional Clause. The question is whether such an 'international engagement' is constitutionally to be regarded as founded upon a unilateral legislative act done *vis-à-vis* the Court, or as founded upon a bilateral, consensual transaction effected by the joining together of the declarations of any given pair of States through the Optional Clause. Nor is this question purely academic, since the unilateral or bilateral character of the 'engagement' may have legal consequences and, notably, with regard to the right to terminate the engagement.<sup>3</sup>

The text of the Optional Clause—'declare that they recognise as compulsory . . . *in relation to any other State* [French text *à l'égard de tout autre État*] accepting the same obligation'—is not crystal clear on the point whether the declaration is to be regarded as made *vis-à-vis* the Court or *vis-à-vis* the other declarants. The majority of States which have made their declarations in French have substituted the words *vis-à-vis de tout autre état* for the words of the Clause, which perhaps suggests that they conceived of their declarations as directed at the other declarants rather than at the Court. More conclusive is the fact that, under the original Statute, the declarations were not notified to the Registrar of the Court but

<sup>1</sup> *Records of the First Assembly* (1920), Committee I, p. 553.

<sup>2</sup> *Ibid.*, pp. 566 and 440.

<sup>3</sup> In this connexion it may obviously be of critical importance to determine how far the law of treaties applies to this class of international engagement; see below, pp. 263-5.

to the Secretary-General of the League of Nations, who was in no sense an officer of the Court, since the Court was not an organ of the League. The Secretary-General in turn registered the declarations under Article 18 of the Covenant expressly as belonging to the category of 'international engagement or acts by which nations or their governments intend to establish *legal obligations between themselves and another State, nation or government*'.<sup>1</sup> The position is similar under the new Statute, declarations being notified to the Secretary-General and registered by him as 'international agreements' under Article 102 of the Charter.<sup>2</sup> Admittedly, the Court is now an organ of the United Nations, but there can be no doubt that the Secretary-General receives the declarations not as an officer of the Court but as a depositary of instruments relating to an international agreement.

The Permanent Court of International Justice referred to the legal nature of declarations under the Optional Clause principally in two cases: *Phosphates in Morocco (Preliminary Objection)* and *The Electricity Company of Sofia and Bulgaria (Preliminary Objection)*. In the *Phosphates* case,<sup>3</sup> the Court pointed out that the making of a declaration is a unilateral act and seemed to imply that this may be a relevant consideration in interpreting its terms. On the other hand, it also stressed the reciprocal nature of the obligations resulting from the declarations of the two parties. In the *Electricity Company of Sofia* case<sup>4</sup> the Court was quite explicit as to the contractual nature of the obligation resulting from the declarations. In this case Belgium invoked, first, a general treaty of arbitration with Bulgaria and, secondly, the Belgian and Bulgarian declarations under the Optional Clause, as bases for the jurisdiction of the Court. In considering whether Belgium was entitled to rely on both possible sources of jurisdiction simultaneously, the Court repeatedly referred to the declarations as constituting a jurisdictional agreement between Belgium and Bulgaria on the same plane as the general treaty of arbitration. Moreover, the dissenting Judges took the same view of the nature of the legal nexus created between the two States by their declarations. Judges Anzilotti and Urrutia said in terms that the Belgian and Bulgarian Declarations resulted in an *agreement between the two States* accepting the compulsory jurisdiction of the Court, while Judge Hudson referred to Belgium and Bulgaria as being bound *inter se*.<sup>5</sup>

In the *Anglo-Iranian Oil Company* case<sup>6</sup> the new Court had occasion to consider the legal nature of declarations under the Optional Clause in connexion with the interpretation of the Iranian declaration. Iran contended

<sup>1</sup> *League of Nations Treaty Series*, vol. 1 (1920), p. 8.

<sup>2</sup> See *United Nations Treaty Series*, vol. 1 (1946-7), Note by the Secretariat, p. xvi; notification to the Secretary-General is expressly directed by Article 36 (4) of the new Statute.

<sup>3</sup> (1938): Series A/B, No. 74, at p. 22.

<sup>5</sup> At pp. 87, 103, and 121 respectively.

<sup>4</sup> (1939): Series A/B, No. 77.

<sup>6</sup> *I.C.J. Reports*, 1952, p. 93.



that the declarations do not set up a contractual relation between the States concerned but that, to the extent to which they coincide, they create obligations for each State *vis-à-vis* the Court. The United Kingdom, on the other hand, contended that any given pair of declarations sets up an essentially contractual relation between the States concerned. The Court, in dealing with a United Kingdom argument that the Iranian declaration must, if possible, be so interpreted as to give meaning to all the words, commented:<sup>1</sup>

‘It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous.’

It will be noted that the Court, while emphasizing the unilateral *drafting* of the instrument, did not deny its legal character as a *treaty text*. Nevertheless, it does seem from this passage and from the passage from the *Phosphates in Morocco* judgment which has already been cited,<sup>2</sup> that for the purpose of interpreting their terms the unilateral origin of the individual declarations will be taken into account.

It is true that so careful a judge as Sir Arnold McNair, in his separate Opinion in the same case,<sup>3</sup> referred to the Optional Clause as ‘in the nature of a *standing invitation made on behalf of the Court* to Members of the League of Nations to accept as compulsory, on the basis of reciprocity, the whole or any part of the jurisdiction of the Court as therein defined’. But it would be reading too much into this somewhat figurative description of the operation of the Optional Clause to treat it as saying that declarations are to be regarded as made in relation to the Court rather than in relation to the other declarant States. At any rate, Judges Alvarez and Read had no doubt that declarations create consensual agreements between each pair of States making them. The former said of the Iranian declaration:<sup>4</sup>

‘The declaration is a multilateral act of a special character; *it is the basis of a treaty made by Iran* with the States which had already adhered and with those which would subsequently adhere to the provisions of Article 36, paragraph 2, of the Statute of the Court.’

Judge Read’s language was similar:<sup>5</sup>

‘Admittedly, it was drafted unilaterally. On the other hand, it was related, in express terms to Article 36 of the Statute, and to the declarations of other States which had already deposited or might in the future deposit, reciprocal declarations. It was intended to establish *legal relationships with such States, consensual in their character*, within the régime established by the provisions of Article 36.’

<sup>1</sup> At p. 103.

<sup>2</sup> Page 252, n. 3, above.

<sup>3</sup> At p. 116.

<sup>4</sup> At p. 125.

<sup>5</sup> At p. 142.

The origins and the treaty character of the Optional Clause, the role of the Secretary-General of the United Nations in receiving and registering notices of declarations under the Optional Clause, the practice of States in making their declarations, and the jurisprudence of the Court, it is considered, leave no real doubt of the consensual nature of the juridical bond established between States by their declarations. This is not to deny the unilateral character of the act by which a State gives its adherence to the obligations of the Optional Clause. The settlement of the terms of its declaration is not a matter for negotiation with other States but is entirely within its own discretion so long as it keeps within the framework of the Statute. The unilateral making of the instrument, the Court has said, may affect the application to it of the ordinary principles of treaty interpretation. But the making of the instrument is a unilateral act only in the same sense that adhering to a pre-existing treaty or ratifying a previously negotiated treaty text is a unilateral act. Judge Alvarez, indeed, termed a declaration under the Optional Clause a 'multilateral act of a special character'. It is multilateral in the sense that it results in relations with a number of States; but the relation between any given pair of States which have made declarations is not, it is believed, precisely of the same character as that which exists between the parties to a multilateral treaty. The relation between two States under the Optional Clause appears to be more a bilateral than a multilateral relation. The declarations or any other subsequent acts of other adherents to the Optional Clause have no bearing on the obligations of the two States *inter se* and, so far as the actual obligation to accept the Court's jurisdiction is concerned, there is little mutuality among the collective body of the States adhering to the Clause. On the other hand, the relation is not exclusively bilateral because, as previously mentioned, the whole Statute is brought in with the Optional Clause and, under Article 62, parties to the Statute with a legal interest which may be affected by the decision may apply to intervene in the case. Thus, while the relation established between States by their declarations is for most purposes bilateral, it also has a multilateral aspect. The easiest course is, perhaps, to call it a consensual relation which is *sui generis*.

#### § 4. *The condition of reciprocity*

A considerable number of the declarations of adherence to the Optional Clause contain a formal statement that they are made 'on condition of reciprocity'. A good number use a double reciprocity formula: '*in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity*'. These phrases were inserted in the earliest declarations *ex abundanti cautela* when jurisdiction under the Optional Clause was still



untried, and the general opinion is that they are otiose.<sup>1</sup> This certainly appears to be the case since the principle of reciprocity is laid down in the Optional Clause itself, under which every declaration is expressed to operate only 'in relation to any other State *accepting the same obligation*'. Reciprocity, in short, is a basic constitutional provision of the Statute applying to every declaration—even to a declaration, like that of Nicaragua, expressed to be made 'unconditionally'.

Paragraph 3 of Article 36, it has already been seen,<sup>2</sup> provides that a declaration may be made 'unconditionally or on condition of reciprocity on the part of several or certain States or for a certain time'. This paragraph does not relate to 'reciprocity'. It simply authorizes States to accept compulsory jurisdiction under the Optional Clause for limited periods, and to make their liability to jurisdiction conditional on compulsory jurisdiction having been also accepted by a particular number of other States or by particular named States. The reference in paragraph 3 to a 'condition of reciprocity on the part of several or certain States' is, indeed, a legacy from a special preoccupation of the Brazilian delegate, M. Fernandez, in the 1920 Committee of Jurists. Brazil considered it impolitic to venture on a unilateral acceptance of compulsory jurisdiction unless some at least of the Great Powers did likewise. Accordingly, M. Fernandez proposed the following formula for the Optional Clause:<sup>3</sup>

'They may adhere unconditionally or conditionally to the Article providing for compulsory jurisdiction, *a possible condition* being reciprocity on the part of a certain number of Members or, again, of a number of Members including such and such specified Members.'

Although M. Fernandez's version of the Optional Clause itself was dropped in favour of the one which now appears in the Statute, the 'condition of reciprocity' on the part of several or certain States was included in paragraph 3 in order to satisfy him. Afterwards Brazil did in fact make her declaration subject to a condition of reciprocity on the part of two, at least, of the Great Powers, but she is the only State to have resorted to this form of condition. Such a condition, as will be appreciated, is not really a 'condition of reciprocity' but rather a condition that the declaration is not to be in force unless and until a certain number of States or certain named States have accepted compulsory jurisdiction under the Optional Clause.

The condition of reciprocity, as has been said, is inherent in every declaration under the Optional Clause, being introduced therein by the words in paragraph 1 'in relation to any other State *accepting the same obligation*'. Taken literally, the words 'accepting the same obligation' might

<sup>1</sup> E.g. Hudson, *op. cit.*, p. 465.

<sup>2</sup> Page 248 above.

<sup>3</sup> *Records of the First Assembly* (1920), Committee 1, p. 553.

seem to imply that one State is bound to another under the Optional Clause only when the obligations assumed in their respective declarations are exactly, or at least broadly, the same. But such an interpretation of the words would have been highly prejudicial to the development of compulsory jurisdiction under the Optional Clause in view of the number and variety of the limitations, conditions and reservations which have in fact been inserted by many States in their declarations. The effect would have been to divide the States adhering to the Optional Clause into small groups whose members had made the same or similar declarations, and to make the members of each group bound *inter se* to accept the Court's compulsory jurisdiction but not bound to accept it at all in relation to members of any other group with declarations having somewhat different terms. Indeed, a few States, having made limitations, conditions, or reservations peculiar to themselves, would have adhered to the Optional Clause and yet not have been liable to compulsory jurisdiction at the suit of any State. That the Optional Clause should have such an effect was clearly not intended by those who drafted it in 1920, and the 'condition of reciprocity' contained in the Clause has in practice been interpreted in a quite different way.

The words 'in relation to any other State accepting the same obligation' appear to have been inserted in the Optional Clause simply for the purpose of limiting a State's liability to accept the Court's jurisdiction at the suit of another State to *cases when the dispute falls within a category of disputes covered by both their declarations*. The roots of the Optional Clause go back beyond the 1920 Committee of Jurists to the Hague Peace Conference of 1907, at which an energetic attempt was made to secure the adoption of the principle of compulsory arbitration for legal disputes. The majority of States at the Conference were prepared to accept compulsory arbitration of all legal disputes subject to the reservation of disputes 'involving vital interests, independence or honour'. But, recognizing the sweeping nature of the exception created by this reservation, the majority were further prepared to accept compulsory arbitration *without any reserve* for disputes in regard to pecuniary claims and in regard to conventions dealing with seven stated categories of matters.<sup>1</sup> In addition, they were prepared to specify in a separate Protocol other categories of matters considered to be susceptible of forming the subject of an agreement for compulsory arbitration without any reserve. Finally, the Protocol was to enumerate the States which, on condition of reciprocity, immediately undertook this obligation with regard to one or more of the specified matters, and these States were to be entitled to extend their undertaking subsequently to other matters on the list by registering their acceptance of the obligation at an inter-

<sup>1</sup> *Actes et Documents* (1907), vol. ii, pp. 136 ff.



national bureau situated at The Hague.<sup>1</sup> The procedure envisaged was that that Protocol should have annexed to it a table on which the specified matters would be set out in columns and then in each column would be indicated the particular States which subscribed to compulsory arbitration in regard to the particular matter listed in that column. Under Article 1, each State entering its name in one or more of the columns undertook to accept compulsory arbitration without reserve '*with respect to each of the other signatory Powers whose reciprocity in this regard is indicated in the same manner in the table*'.<sup>2</sup> In short, the reciprocity which the delegates had in mind at the 1907 Conference was simply that each State would be under an obligation to submit to compulsory arbitration without reserve in relation to any other State for those categories of disputes with respect to which both States had accepted that obligation.

There can be little doubt that the condition of reciprocity inserted in the Optional Clause in 1920 was intended to be of the same kind. The Optional Clause, in the form in which it appears in the 1920 Statute of the Court, allowed States the choice of accepting compulsory jurisdiction 'in all or any' of specified categories of legal disputes, with the resulting possibility that they might be found to have accepted it with respect to different categories. The condition of reciprocity expressed in the words 'in relation to any other State accepting the same obligation' was intended simply to limit the obligation to cases where both States had subscribed to the Optional Clause in regard to the particular class of legal dispute in question. It does not seem that the draftsmen of the 1920 Statute then had in mind the question of reciprocity in regard to conditions and reservations or to time-limits. In practice, however, the divergencies in the declarations of States under the Optional Clause have arisen from the insertion of differing conditions, reservations, and time-limits, not from the acceptance of jurisdiction specifying different categories of legal disputes. Consequently, it is in connexion with conditions, reservations, and time-limits that the problem of reciprocity has proved primarily to be of interest and importance. In these connexions, as previously indicated, the words of the Optional Clause 'in relation to any other State *accepting the same obligation*', if literally applied, would have the effect of confining compulsory jurisdiction under the Clause to States making declarations in identic terms. The words have not, however, been treated as laying down a condition that *exactly or even broadly the same obligation of compulsory jurisdiction must have been accepted by each State*. The words 'in relation to any other State accepting the same obligation' have rather been interpreted as requiring that there shall be complete reciprocity in the operation of compulsory jurisdiction under

<sup>1</sup> The draft proposals also contemplated the addition of new matters to the list and the subsequent adherence to the Protocol of other States; *ibid.*

<sup>2</sup> *Ibid.*, at pp. 161-2.

the Optional Clause *as between two States which have accepted the obligation in different terms*. This interpretation emerges very clearly from the attitude of States before the Court and from the jurisprudence of the Court.

The first case in which reciprocity in relation to conditions and reservations was discussed was the case of the *Phosphates in Morocco*,<sup>1</sup> in which Italy filed an Application against France in respect of the alleged confiscation by the latter of an Italian national's phosphate licences without compensation. France's declaration contained a limitation of her acceptance of compulsory jurisdiction to disputes 'which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification'. Italy's declaration contained a condition requiring a previous attempt to have been made to settle the dispute through the diplomatic channel, but did not include a limitation *ratione temporis* in the same terms as the French limitation. France lodged a preliminary objection to jurisdiction both on the ground of her own limitation *ratione temporis* and on the ground of the Italian condition concerning prior recourse to the diplomatic channel. In invoking the Italian condition precedent, France referred to the words 'in relation to any other State accepting the same obligation' as creating a condition of reciprocity, and Italy did not contest France's right to rely on the Italian condition precedent.

France also invoked the principle of reciprocity in connexion with her limitation *ratione temporis*. She pointed out that the ratification of her unilateral declaration on 25 April 1931 did not by itself place her under any obligation whatever *vis-à-vis* Italy and that, owing to the requirement of reciprocity, the juridical bond between France and Italy under the Optional Clause only arose some five months later, on 7 September 1931, when Italy's declaration also became effective by ratification. She then proceeded to argue that, for the purpose of applying the limitation *ratione temporis* in her own declaration, the relevant date was not 25 April 1931, the date which she herself had specified in the declaration, but 7 September 1931, the date when the two States first became mutually bound under the Optional Clause. Italy objected that, even if the date of the Italian ratification was the date on which the two States first became mutually bound, the date for applying the French limitation *ratione temporis* must be the date actually specified in the French declaration, namely, the date of the French ratification. Reciprocity, while it might require the French limitation to be applied equally to both States in accordance with its terms, could not have the effect of applying it in an altered form by arbitrarily substituting another date for the date actually specified in the French limitation. France, taking the view that the difference of date was not, in fact, of any practical consequence in the case, did not press her argument. The Court equally

<sup>1</sup> (1938): Series A/B, No. 74.



considered the difference in date to be immaterial and expressed no opinion on the point. It is, however, believed to be clear that the French contention concerning the date for applying her limitation *ratione temporis* was ill-founded and that the Italian view of the operation of reciprocity in such cases was correct.<sup>1</sup>

Neither France nor Italy in this case appears to have had any doubt that the operation of the principle of reciprocity with respect to conditions and limitations is to make any condition or limitation found in the declaration of one party to a dispute both binding on and available to the other party for the purpose of their mutual relations under the Optional Clause. Similarly, the Court said, with reference to a difference between the French and Italian limitations *ratione temporis*:<sup>2</sup>

'This [the Italian] declaration does not contain the limitation that appears in the French declaration concerning the situations or facts with regard to which the dispute arose; *nevertheless, as a consequence of the condition of reciprocity stipulated in Article 36 (2) of the Statute of the Court it is recognized that this limitation holds good between the parties.*'

In point of fact, it seems open to question whether reciprocity was the true ground for applying a limitation contained in the *defendant's* own declaration. The true ground would seem to be the fundamental rule that a State can never be brought before the Court except on the conditions on which it has consented to jurisdiction.<sup>3</sup> The principle of reciprocity only needs to be brought in when the defendant State is objecting to jurisdiction on the basis of a limitation, condition, or reservation contained in the *plaintiff* State's declaration.

In the *Phosphates in Morocco* case, therefore, the Court's pronouncement on the operation of reciprocity in regard to limitations may not have been strictly relevant to the facts of that case. The same cannot, however, be said of a similar pronouncement in the *Electricity Company of Sofia and Bulgaria* case,<sup>4</sup> in which the Court had again to consider the operation of the 'condition of reciprocity' in the context of a limitation *ratione temporis*. This time, the declaration of the defendant State, Bulgaria, was unconditional and the limitation *ratione temporis* was contained in that of the plaintiff

<sup>1</sup> The French limitation *ratione temporis* was so designed as to exclude (a) all disputes existing prior to 25 April 1931, and (b) disputes subsequent to 25 April 1931, with regard to situations or facts prior to that date. The Italian limitation was so designed as to exclude all disputes existing prior to 7 September 1931 but to include all disputes arising after that date without regard to the date of the situations or facts out of which they arose. Consequently, neither the French nor Italian declarations excluded a dispute arising after 7 September 1931, the date of Italy's ratification, with respect to situations or facts after 25 April 1931, the date of France's ratification. Yet the French contention would have denied the Court's jurisdiction over this class of dispute.

<sup>2</sup> At p. 22.

<sup>3</sup> In the *Mavrommatis Palestine Concessions* case the Court had said that its jurisdiction is 'invariably based on the consent of the respondent' and only exists in so far as this consent has been given: (1924), Series A, No. 2, p. 16.

<sup>4</sup> (1939): Series A/B, No. 77, 80-82.

State, Belgium. Bulgaria, invoking the principle of reciprocity, claimed the benefit of Belgium's limitation *ratione temporis* and objected to jurisdiction. The Court thereupon said:<sup>1</sup>

'Although this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration, it is applicable between the Parties.'

Several of the dissenting Judges<sup>2</sup> also referred to the operation of reciprocity, all of them treating the limitations, conditions and reservations in the declaration of one party as automatically read into that of the other party. After this case, therefore, it could be regarded as settled that, in virtue of the reciprocity laid down in the Optional Clause, a defendant State can always rely upon a limitation, condition, or reservation in its opponent's declaration.<sup>3</sup>

In the *Anglo-Iranian Oil Company* case<sup>4</sup> the new Court made a brief pronouncement on the operation of reciprocity. The declarations of both the plaintiff State, the United Kingdom, and the defendant State, Iran, contained a limitation *ratione temporis* together with other reservations. In addition, Iran's Declaration contained words restricting her acceptance of jurisdiction absolutely to disputes concerning matters relating to the application of treaties accepted by Iran. The Court said:<sup>5</sup>

'By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself. This is common ground between the Parties.'

In this case, again, Iran without invoking the principle of reciprocity was fully entitled, as defendant, to object to being brought before the Court except within the limits set by the terms and conditions of her own Declaration. The above pronouncement has, therefore, to be understood simply as underlining that, owing to the principle of reciprocity, the

<sup>1</sup> At p. 81.

<sup>2</sup> E.g., Judges Anzilotti (at p. 87), Urrutia (at p. 103), Van Eysinga (at p. 109), and Hudson (at p. 121).

<sup>3</sup> In the *Electricity Company of Sofia and Bulgaria* case the Belgian declaration was ratified on 10 March 1926 and, in applying the limitation *ratione temporis*, the Court said (at p. 81): 'The Parties agree that the date on which the dispute arose was June 24, 1937, i.e. after 10 March, 1926,—the date of the establishment of the juridical bond between the two States under Article 36 of the Court's Statute.' Here the Court's judgment, although correct in substance, appears to be founded on wrong reasoning. 10 March 1926, the date of the Belgian ratification, was the relevant date for applying the limitation *ratione temporis*, not because it was the date of the establishment of the juridical bond between the two States, but because it was the date specified in the Belgian declaration as the date by reference to which disputes were excluded *ratione temporis* from its acceptance of the Optional Clause. The date of the establishment of the juridical bond under the Optional Clause could not, as such, have any bearing upon the scope of the Belgian limitation *ratione temporis*.

<sup>4</sup> *I.C.J. Reports*, 1952, p. 93.

<sup>5</sup> At p. 103.



declarations of both parties must always be taken into account and that the Court's jurisdiction in any given case is the highest common factor of the two declarations. The general rule, therefore, is that jurisdiction under the Optional Clause is conferred on the Court '*only to the extent to which the two declarations coincide in conferring it*'. Judge McNair, looking at the question of reciprocity rather from the point of view of what has to be shown in a concrete case, said in his individual Opinion:

'the declarations of both States [must] *concur in comprising the dispute in question within their scope.*'

This formulation of the applicable principle, it will be appreciated, comes close to the original concept of reciprocity which inspired those who drafted the Optional Clause in 1920.

The attitude of States in cases before the Court and the jurisprudence of the Court itself thus establish that the 'condition of reciprocity' contained in the Optional Clause does not mean that both States must have accepted the same or even broadly the same measure of compulsory jurisdiction. It means two things. Primarily, it means that if compulsory jurisdiction under the Optional Clause is to apply to a particular dispute, both States must have made a declaration which comprises that dispute within its scope. As a corollary, it also means that a party to a dispute whose own declaration comprises that dispute within its scope is always entitled to invoke a condition, reservation, or limitation in its opponent's declaration for the purpose of excluding the particular dispute from the application of the Optional Clause.

### § 5. *Time-limits as escape clauses*

The majority of States, as previously mentioned, have taken advantage of the authority given in Article 36 (3) of the Statute to make their declarations 'for a certain time' and have placed a variety of time-limits upon the currency of their declarations. The time-limits with which this article is particularly concerned are those under which the declaration is expressed to be terminable by notice to the Secretary-General. Before examining them, however, it is necessary to consider (1) what may conveniently be called the rule in the *Nottebohm* case, and (2) the general principle in regard to unilateral termination of a declaration.

#### *The rule in the Nottebohm case*

In the *Nottebohm* case (Preliminary Objection)<sup>1</sup> Guatemala's declaration was expressed to be valid for a period of five years from 27 January 1947, and was therefore due to expire on 26 January 1952. Liechtenstein's declaration was revocable on twelve months' notice but, notice of revocation not

<sup>1</sup> *I.C.J. Reports*, 1953, p. 1111.

having been given, was in full force. On 17 December 1951, that is, about five and a half weeks before Guatemala's declaration was due to expire, Liechtenstein filed an Application presenting a case against Guatemala. The latter lodged a preliminary objection to jurisdiction on the basis that after the expiry of her declaration the Court had no power to hear any case against Guatemala under the Optional Clause, even although the Application might have been filed during the period of the currency of her declaration. She did not dispute that at the date when the Liechtenstein Application was filed the Court became regularly seized of jurisdiction over the case. She claimed that her declaration must be understood as relating generally to the administration of justice by the Court, not merely to the seizing of the Court with jurisdiction to administer justice, with the result that the expiry of the declaration terminated the Court's power to administer justice in the case.

The Court rejected Guatemala's interpretation of the effect of her declaration, pointing out that it was an entirely novel one. In both the *Losinger & Co.*<sup>1</sup> and *Phosphates in Morocco* cases<sup>2</sup> the declaration of the defendant State had expired shortly after the filing of the Application in the case. Yet, although in each case the defendant State had raised other objections to jurisdiction, it had never thought to claim that the expiry of its declaration involved automatically the removal of the case from the Court's list. These were both cases of the simple expiry of a time-limit specified in the declaration. The Court could also have adduced the *Anglo-Iranian Oil Company* case,<sup>3</sup> decided in the previous year, as another example. Iran's declaration was terminable on notice, and after the filing of the United Kingdom's Application in the case Iran did terminate her declaration by notice to the Secretary-General of the United Nations. Iran raised every possible ground of objection to the Court's jurisdiction but she did not rely on the subsequent termination of her declaration as precluding the Court from further considering the case. The Court held in the *Nottebohm* case that the Optional Clause and the declarations of States thereunder relate to the seising of the Court with jurisdiction, not to the adjudication of the suit. It said:<sup>4</sup>

'The purpose of Article 36, paragraph 2, and of the declarations relating thereto, is to regulate the seizing of the Court: under the system of the Statute the seizing of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations. This being so, the lapse of a Declaration, by reason of the expiry, before the filing of the Application, of the period fixed therein makes it impossible to invoke that Declaration in order to seize the Court.

The seizing of the Court is thus dominated by the Declarations emanating from the

<sup>1</sup> (1936): Series A/B, No. 67.

<sup>3</sup> *I.C.J. Reports*, 1952, p. 93.

<sup>2</sup> (1938): Series A/B, No. 74.

<sup>4</sup> At p. 122.



parties when recourse is had to the compulsory jurisdiction in accordance with Article 36, paragraph 2. But the seizing of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules which the Court has drawn up by virtue of the powers conferred upon it by Article 30 of the Statute. *Once the Court has been regularly seized, the Court must exercise its powers, as these are defined in the Statute.* After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, *which the Court must exercise whenever it has been regularly seized* and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible.' (Italics added.)

Accordingly, when an Application has been regularly filed in a particular case while the declarations of both States were current, the subsequent lapse of one of the declarations, whether by the expiry of a fixed period or by notification to the Secretary-General under the terms of the declaration, does not deprive the Court of jurisdiction over that case. On the other hand, the prior lapse of a declaration, by however brief a space of time, suffices to prevent the establishment of the Court's jurisdiction by means of an Application based upon the expired declaration.

#### *Unilateral termination of a declaration*

The making of a declaration, it has been seen,<sup>1</sup> is a unilateral act; it does not, however, follow that the unmaking of a declaration is equally a unilateral act at the free discretion of the State concerned. The declaration, once made, sets up consensual relations with other States and the question necessarily arises whether a State can have any right to terminate its declaration except in accordance with an express term of the declaration. This question was raised in 1938 when Paraguay, whose declaration of 1933 contained no provision for its own termination, notified the Secretary-General of the League of a recent decree which purported to withdraw the declaration. Paraguay's attempt to rescind her declaration was motivated by the fear that Bolivia might file an Application under the Optional Clause in the Gran Chaco boundary dispute, and Bolivia, not unnaturally, notified the Secretary-General of her 'most formal reservations as to the legal value of the decree'.<sup>2</sup> Bolivia at the same time requested that her reservations should be communicated to other signatories of the Statute, and five other States then also made reservations as to the legal effects of Paraguay's purported cancellation of her declaration.<sup>3</sup> Bolivia and these five States all had made declarations for specific periods of years which had not yet expired. They did not enlarge upon their reasons for contesting Paraguay's right to terminate her declaration, but two of them, the Netherlands and Czechoslovakia, did indicate that they regarded the question as being governed by the law relating to the termination of treaties. This would

<sup>1</sup> Pp. 252-4 above.

<sup>2</sup> (1938-9): *P.C.I.J.*, Series E, No. 15, p. 227.

<sup>3</sup> *Ibid.*

normally mean that a State having a declaration without any provision for its termination would not be entitled to cancel it as against other States having declarations for fixed periods except with their consent. Otherwise, termination of the declaration would not be justifiable except by reference to one of the special rules concerning the termination of treaties, such as the doctrine of *rebus sic stantibus*; moreover, under the final paragraph of Article 36 of the Statute it would be for the Court to decide any dispute as to the validity of a purported cancellation of a declaration.<sup>1</sup>

The Court, as it happened, never had occasion to consider the legal effect of Paraguay's attempted cancellation of her declaration. The Registry continued to include Paraguay amongst the States which had declarations under the Optional Clause, drawing attention at the same time to the Paraguayan instrument of cancellation of 1938 and to the reservations in regard to it made by Bolivia and the other five States. When the Statute of the new Court was drawn up, Paraguay took no action to clarify the position in regard to her declaration, despite the fact that paragraph 5 of Article 36 of the new Statute provides that declarations under the old Statute 'which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice *for the period which they have still to run and in accordance with their terms*'. The Registry of the new Court appears, in consequence, to have felt itself obliged to maintain Paraguay's 1933 declaration in the list of operative declarations under the Optional Clause, while again drawing attention to the notice of cancellation and to the reservations made in regard to that notice. The only possible interpretation of the Registry's action is that it considers the legal effect of a cancellation of a declaration which has no time-limit to be open to question.

The reservations of Bolivia and the other five States in 1938 and the cautious attitude of the Registry in regard to the Paraguayan notice of cancellation are believed to have been well founded. A State which, having the right to make its declaration only 'for a certain time', chooses to make it without time-limit, is in a position analogous to that of a State which has entered into a bilateral treaty of indefinite duration. If two States both have declarations without time-limit, their position *vis-à-vis* each other seems clearly to be that of parties to a bilateral treaty of indefinite duration, and any right which either State may have to put an end to their mutual obligation to accept the compulsory jurisdiction of the Court under the Optional Clause can only derive from the general law concerning the termination of treaties. The agreement between the two States, which is

<sup>1</sup> Sweden, in reserving her position in regard to Paraguay's notification of the cancellation of the Paraguayan declaration, emphasized that it would be for the Court to determine the legal effect of the notification. (1938-9): *P.C.I.J.*, Series E, No. 15, p. 227.



constituted by their parallel acceptances of the Optional Clause, contains no reference to a right arbitrarily to terminate their mutual obligation under the Clause simply by giving notice to the Secretary-General. Nor can such a right be implied in Article 36 of the Statute, paragraph 3 of which clearly contemplates an indefinite commitment unless provision for a time-limit is made when a State makes its declaration.

The same reasoning applies to the case of a State whose declaration is either made for a specific period of years or is expressed to be terminable after a specific period of notice and which nevertheless purports, regardless of the terms of the declaration, to cancel it immediately by notice to the Secretary-General. The legitimacy of terminating any declaration otherwise than in accordance with its terms must, on principle, hinge upon the rules governing the termination of treaties. This is borne out by the fact that when France, the United Kingdom, and other Commonwealth States notified the Secretary-General of the League in September 1939 that they would 'not regard their acceptances of the Optional Clause as covering disputes arising out of events occurring during the present hostilities', they formulated the grounds on which they justified their action in a manner strongly to imply that they were invoking the doctrine of *rebus sic stantibus*.<sup>1</sup> At the date in question the declarations of these States were valid for fixed periods which had not yet expired, and they clearly did not consider themselves to have the right unilaterally to terminate or vary their declarations except on principles analogous to those governing the termination or variation of treaties. Even so, a number of neutral States made reservations in regard to the legal effect of the action taken by these States.<sup>2</sup>

On principle, therefore, there is no right of unilateral termination of a declaration under the Optional Clause unless the right has been expressly reserved in the declaration. On the same principle also there is not, in the absence of an express term, any right of unilateral variation of a declaration previously made and still in force. It is probable that the condition of reciprocity laid down in the Optional Clause gives a State the right to rely on a time-limit in another State's declaration for the purpose of terminating the particular obligation between them. But this important question will be deferred until Section 7 below.

### *Reservation of a right to terminate on giving notice*

A number of States have interpreted the words 'for a certain time' (*pour un délai déterminé*) in paragraph 3 of Article 36 as authorizing them to make

<sup>1</sup> *League of Nations Official Journal*, 1939, pp. 407-10; *ibid.*, 1940, p. 44. These States alleged that the conditions which prevailed at the time of their acceptance of the Optional Clause no longer existed.

<sup>2</sup> Belgium, Brazil, Denmark, Estonia, Haiti, Netherlands, Norway, Peru, Sweden, Switzerland, and Thailand: *League of Nations Official Journal*, 1939, p. 410; *ibid.*, 1940, pp. 45-47.

declarations which have no set period but are to remain in force until notice of their termination is given. Thus in the 1954-5 *Year Book of the Court* two declarations are expressed to be terminable after twelve months' notice, four declarations after six months' notice, and ten declarations immediately on notice to the Secretary-General. Little objection can be taken to the six declarations the expiry of which is subject to a specific period of notice. Although the right to terminate gives the States concerned some chance of manœuvring to avoid jurisdiction in an impending dispute, any other State engaged in a dispute with one of them will always be in a position to know a reasonable time beforehand exactly on what date its opponent's liability to compulsory jurisdiction will terminate, and can shape its course of action accordingly. Very different, however, is the position of a State engaged in a dispute with one of the States whose declarations are terminable immediately on notice being given to the Secretary-General. At any moment and without any warning this State may find that its opponent has withdrawn the dispute from the compulsory jurisdiction of the Court simply by notifying the Secretary-General of the immediate termination of its declaration. Such a use by an opponent of its right to terminate its declaration with immediate effect, in order to remove a current dispute from the jurisdiction of the Court, could only be defeated with certainty by the premature filing of an Application at the outset of the dispute. A State, for reasons of comity, is normally reluctant to drag another State before the Court without first making a serious attempt to arrange the matters in dispute by diplomatic negotiations.<sup>1</sup> But a State confronted with the possibility that its opponent may at any moment terminate its adherence to the Optional Clause takes the risk of losing its remedy under the Clause altogether if it does not promptly file an Application as soon as a dispute exists. One objection to declarations immediately terminable by a mere notice to the Secretary-General is, therefore, the pressure which they put on States to institute proceedings under the Optional Clause without first exhausting the possibilities of settlement out of Court.

Declarations containing this form of time-limit are, however, open to the more fundamental objection that they tend to undermine the whole purpose of the Optional Clause. So long as the State concerned sees itself only as a potential plaintiff, it will maintain its declaration in order that it may be in a position to bring any opponent compulsorily before the Court.

<sup>1</sup> In the absence of a specific provision to that effect in one of the declarations, the prior exhaustion of diplomatic means of settlement is not a condition of the exercise of the Court's jurisdiction under the Optional Clause. It appears that there must have been sufficient interchanges between the parties to establish the existence of a 'dispute'; but that is all that the Statute requires. See *Electricity Company of Sofia and Bulgaria* case (1939): *P.C.I.J.*, Series A/B, No. 77, at p. 83; see also Hudson, *op. cit.*, pp. 413-16.



But the moment it sees a serious possibility that it may itself be brought compulsorily before the Court as defendant—and especially in a case where one of its so-called ‘vital interests’ is involved—it will be tempted promptly to terminate its declaration and put itself out of its opponent’s reach. Thus, the right to terminate the declaration immediately by the mere giving of notice may be used *not so much as a means of terminating the general obligation of the State concerned to compulsory jurisdiction under the Optional Clause, but as a means of withdrawing from the Court’s compulsory jurisdiction a particular dispute after it has arisen*. In short, the right to terminate the declaration may be used to serve much the same purpose as the reservation of ‘matters affecting vital interests, independence and honour’ commonly found in the arbitration treaties concluded in the period between the First Hague Peace Conference and the establishment of the Permanent Court of International Justice. Under the latter form of reservation, as was pointed out at the Second Hague Peace Conference,<sup>1</sup> the arbitration provided for by the treaty was compulsory only in form, since the moment a dispute arose a party had the right to exclude the dispute from the operation of the treaty by applying the reservation. Under that form of reservation the right to specify the dispute as excluded from the agreement to arbitrate was exercisable even after the other State had already invoked the agreement, and the compulsory arbitration professedly established by the treaty was completely illusory. The reservation of a right to terminate a declaration under the Optional Clause does not go to the same lengths in destroying the obligation to accept compulsory jurisdiction. The difference is that under the rule in the *Nottebohm* case<sup>2</sup> the exercise of the right to terminate the declaration is ineffective to withdraw a particular dispute from the Court if the other State has already invoked the compulsory jurisdiction of the Court by filing an Application. This difference is a material one, since the compulsory jurisdiction accepted in the declaration is very much a reality up to the moment when notice of termination is given.<sup>3</sup> It is, indeed, only this fact, that the compulsory jurisdiction has its full effects until notice of termination is given, which prevents a declaration in this form from being regarded as totally incompatible with the Optional Clause. Nevertheless, there is a danger that the right to terminate the declaration may be used as a general escape-clause to prevent a particular current dispute from being submitted to the Court.

The warning signs in State practice are clear. Australia, faced with the

<sup>1</sup> E.g., by Von Bieberstein, the German delegate: *Actes et Documents* (1907), vol. ii, pp. 51 and 53.

<sup>2</sup> See above, p. 261.

<sup>3</sup> In the *Anglo-Iranian Oil Company* case, Iran failed to cancel her declaration until *after* the filing of the United Kingdom’s Application and would, in consequence, have been subject to compulsory jurisdiction in that case had she not been able to establish that the particular dispute was not covered by the terms of her declaration.

possibility of a Japanese Application in her pearl fisheries dispute with Japan, terminated her declaration in 1954 and issued a fresh one accepting compulsory jurisdiction for disputes concerning sedentary fisheries of the Australian continental shelf only, on condition that a *modus vivendi* was first agreed between the parties to cover the interim period before the final decision of the Court.<sup>1</sup> Admittedly, the State concerned did not seek to withdraw the dispute altogether from the Court. It did, however, terminate its existing declaration apparently for the purpose of making special provision for a current dispute, and it could with equal facility have terminated its declaration as a means of withdrawing the dispute altogether from the Court. In October 1955 the United Kingdom appears in fact to have terminated its declaration for the purpose of excluding a current dispute from its acceptance of compulsory jurisdiction. It notified the termination of a declaration *made only five months previously* and issued another one containing a new reservation excluding 'disputes in respect of which arbitral or judicial proceedings are taking, or have taken, place with any State which, at the date of the commencement of the proceedings, had not itself accepted the compulsory jurisdiction of the International Court of Justice'. The terms of this reservation indicate that the United Kingdom's sudden alteration of its declaration had reference to the breakdown of the Buraimi Arbitration a few weeks before owing to the wholesale bribery of potential witnesses by the Saudi Arabian Government and that the new reservation was introduced specifically to exclude the Buraimi dispute. Admittedly, the circumstances were somewhat special and the United Kingdom had the best of reasons for acting as it did. Nevertheless, its action provides a striking illustration of how a declaration terminable on notice may be terminated *ad hoc* for the purpose of declining jurisdiction in a current dispute. Two further examples may be given. The first is Iran's termination of her declaration shortly after the filing of the United Kingdom's Application in the *Anglo-Iranian Oil Company* case, which has already been referred to on page 262 above. It is reasonable to suppose that Iran's action was taken with a view to putting herself in the best possible posture of defence against the United Kingdom in the event of Iran being able, by her preliminary objections, to defeat the latter's initial Application to the Court. The other example is the very recent termination of India's declaration immediately after the filing of the Portuguese declaration in the dispute concerning Portugal's claim to rights of passage over Indian territory. India promptly reissued her declaration with a new reservation of 'matters of domestic jurisdiction' in the subjective United States form of 'matters which are essentially within the domestic jurisdiction of' India as determined by India.

<sup>1</sup> See *Year Book of the International Court of Justice*, 1953-4, p. 210.



The three States mentioned in the previous paragraph as having terminated their declarations and reissued them with new reservations were States of the British Commonwealth, whose declarations are modelled on Great Britain's original declaration in 1929. The United Kingdom has, indeed, the chief responsibility for introducing a form of declaration which now threatens seriously to weaken the Optional Clause. The United Kingdom can plead in extenuation that its introduction of declarations terminable by notice was more by inadvertence than by design. Its original declaration was expressed to be valid 'for 10 years and thereafter until such time as notice may be given to terminate the acceptance'. Consequently, there was nothing ambiguous or half-hearted about its original acceptance of compulsory jurisdiction. The United Kingdom bound itself for ten years certain, and the provision in regard to notice of termination was inserted merely as a convenient means of extending the period beyond ten years without express renewal rather than as a means of acquiring freedom to contract in and out of the Optional Clause as its interests might require. Nevertheless, when the ten years had passed, its declaration became terminable on notice and it was in the position of being able to contract in and out of the Optional Clause as its interests dictated. The declarations of India and the Dominions had the same form of time-limit, and by the end of September 1939 all had become terminable at any moment simply by notice to the Secretary-General of the League. Meanwhile, in 1930 Iran and in 1938 Iraq had adopted this form of time-limit and in due course their declarations also became immediately terminable by notice. The next development was in April 1940, when the Union of South Africa notified the Secretary-General of the termination of her original declaration and issued a fresh declaration, which simply said that it was to remain in force 'until notice of termination is given'.<sup>1</sup> In the case of South Africa, this formula was a mere restatement of her existing position under the Optional Clause after the expiry of the ten-year period. But the issue of a declaration which boldly provided that it was to be immediately terminable from the very first moment of its signature drew attention to a possible method of subscribing to compulsory jurisdiction under the Optional Clause with an absolute minimum of actual commitment to submit to jurisdiction.

Up to the present the South African form of time-limit has only been copied by the United Kingdom and by India in new declarations which, like that of South Africa, replaced existing declarations which were already terminable on notice. In principle, however, the new declarations of these three States of the British Commonwealth have to be regarded as independent of the earlier declarations which they replace and, assuming that they are compatible with Article 36 of the Statute, they provide precedents for

<sup>1</sup> (1939-45): Series E, No. 16, p. 326.

accepting compulsory jurisdiction under the Optional Clause while reserving the right to repudiate it again at any moment and without any warning. Whether these declarations are compatible with Article 36 depends on whether a declaration for no certain period and terminable by simple notification to the Secretary-General falls within the authority given in paragraph 3 of Article 36 to make declarations 'for a certain time' (*pour un délai déterminé*). The States concerned would presumably invoke the maxim *id certum est quod certum reddi potest* as bringing their declarations within paragraph 3, and there does not, in fact, seem to have been any disposition to challenge their validity. The danger is that, on the basis of these precedents, it may become normal for new declarations not to be made for any certain period but merely until notice of their revocation is given. As it is, in the post-war period five further States, the Netherlands and the Philippines (1946), France (1949), Liberia (1952), and Portugal (1955), have made declarations in the original British Commonwealth form for a specific period of years and thereafter until notice of termination is given.<sup>1</sup> By 1958 eleven declarations, nearly one-third of all those in force, will be immediately terminable by notice. The flexibility of this form of declaration and the freedom of manœuvre which it gives may lead to its extended use, especially if there should be any lessening of confidence in the Court. If this occurs, compulsory jurisdiction under the Optional Clause will have become an extremely fragile instrument for the judicial settlement of disputes and an institution very different from that hoped for by those who devised the Clause.

#### § 6. *Reservations as escape clauses*

Article 36, as previously mentioned,<sup>2</sup> contains no provision concerning the insertion of limitations, reservations and conditions in declarations accepting the Optional Clause, and this omission has been interpreted as giving complete freedom to insert any special term not incompatible with the fixed constitutional provisions of the Statute. The liberal use made by States of the power to restrict the scope of their declarations by limitations, conditions and reservations is to be regretted because of the large inroad which it makes into what was hoped to be a general system of compulsory jurisdiction. It is not, however, entirely pernicious in its effect so long as the matters excluded from acceptance of the Optional Clause are fixed in the declarations themselves by reference to determinate, objective, criteria. This is, for example, the case with the frequently found limitation to future disputes, which usually takes the double form of limiting the acceptance to 'all disputes arising after the ratification of the present declaration with

<sup>1</sup> See *Year Book of the International Court of Justice*, 1954-5, pp. 192-6. Portugal's declaration will presumably appear in the 1955-6 *Year Book of the Court*.

<sup>2</sup> Page 248 above.



regard to situations or facts subsequent to the said ratification'. Most 'subsequent disputes' will relate to situations or facts which have a history going back some years, and a loose interpretation of the limitation might result in a drastic curtailment of the matters covered by the declaration. But the limitation is objectively stated and the Court has had no difficulty in keeping it within bounds by holding that a prior situation or fact, if it is to bring the limitation into play, must be one which is 'the source of the dispute'.<sup>1</sup> A State cannot, therefore, by a specious invocation of tenuous connexions between a recent 'dispute' and a past 'situation or fact', use this form of limitation as a general escape clause.

Some reservations are open to criticism on the ground that the criteria, although objective, are so broadly stated as to leave doubts as to their true scope. Such is the case with the common reservation of 'disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to other methods of pacific settlement'.<sup>2</sup> Others give some opportunity for delaying tactics, for example, the reservation of the right to 'suspend judicial proceedings under certain conditions in the case of disputes under consideration by the Security Council'.<sup>3</sup> But the application of these reservations is to be determined by objective criteria and there is no basic inconsistency with the principle of compulsory jurisdiction.

#### *Subjective reservations concerning matters of domestic jurisdiction*

The inconsistency with the principle of compulsory jurisdiction comes when the application of a reservation to a particular dispute or category of disputes is not pre-determined by the words of the reservation but is left for subsequent determination at the discretion of the State concerned. The obvious example is the reservation which was introduced by the United States in 1946<sup>4</sup> and which excludes

'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.'

This unblushingly subjective form of reservation appears to reserve the right, whenever a dispute arises, to determine it to be a dispute 'with regard to matters which are essentially within the domestic jurisdiction of the United States of America' and thereby exclude it from the scope of the United States acceptance of compulsory jurisdiction. In consequence, the declaration does not finally define beforehand the matters in regard to which the United States accepts jurisdiction; the declaration leaves the definition

<sup>1</sup> *Electricity Company of Sofia and Bulgaria* case (1939): Series A/B, No. 77, at p. 82.

<sup>2</sup> See Lauterpacht in *Economica*, 10 (1930), p. 145.

<sup>3</sup> Found in the declarations of most Commonwealth States. The opportunity for chicane provided by this reservation is limited by the power of the Security Council to remove the dispute from its agenda for the express purpose of bringing the Court's compulsory jurisdiction into play.

<sup>4</sup> *Year Book of the International Court of Justice*, 1946-7, p. 217.

until after a case has arisen, and leaves it then not to the determination of the Court but to the United States itself.

This form of 'domestic jurisdiction' reservation was examined at some length by the present writer in the previous volume of this *Year Book*,<sup>1</sup> where the conclusion was reached that it is open to the Court to hold that a declaration which contains this form of reservation has no legal force as a declaration under the Optional Clause. This view of the United States declaration can, it was suggested, be taken on two grounds. First, the reservation is scarcely compatible with paragraph 6 of Article 36 of the Statute, under which it rests with the Court to decide any dispute as to its jurisdiction, and this paragraph appears to be part of the fixed constitution of the Court. Secondly, the reservation of what appears to be a general right to exclude from the scope of the declaration any dispute at any time at the will of the State concerned can scarcely be regarded as a genuine 'recognition' of the Court's compulsory jurisdiction within the meaning of the Optional Clause. It would serve no purpose to re-examine here all the considerations advanced in the earlier paper for holding that a declaration which contains the United States form of 'domestic jurisdiction' reservation lacks the quality of a valid declaration under the Optional Clause. By looking only at the form and not the substance of the United States reservation, it may perhaps be possible to reconcile it with the letter, although not the spirit, of Article 36 (6) of the Statute. In form the reservation does not deny the competence of the Court to decide any dispute as to its jurisdiction; it merely excludes from the United States acceptance of jurisdiction all disputes which come within the category of 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. If in a particular case no such 'determination' is made by the United States, *cadit quaestio*. If, on the other hand, such a determination is made and is disputed, the Court remains competent to 'decide' the dispute even although it must do so in favour of the United States by reason of the terms of the reservation.<sup>2</sup> The substance of the matter is that the United States has invested itself with the power, through the use of this reservation, to prevent the Court from examining whether the United States acceptance of compulsory jurisdiction applies in any given case.<sup>3</sup>

<sup>1</sup> Vol. 31 (1954), pp. 131-7.

<sup>2</sup> It would also be competent to decide the question whether there had been a 'determination' by the United States bringing the reservation into play.

<sup>3</sup> It is tempting to suggest an intermediate interpretation which would leave the Court power to decide whether a 'determination' of matters essentially of domestic jurisdiction was a possible one in the particular case, having regard to established principles of international law. Such an interpretation appears, however, to be excluded by the abundant evidence that the United States intended its reservation to give it the complete right to insist upon its own determination of matters essentially of domestic jurisdiction. In the *Anglo-Iranian Oil Company* case (I.C.J.



If the United States form of reservation is held to be compatible with the letter of Article 36 (6), it does not remove the second ground of objection to the reservation. The State concerned arrogates to itself a general power to veto the application of compulsory jurisdiction whenever a particular dispute arises. This form of escape clause is infinitely more pernicious than a right to terminate the declaration immediately on notice, *since it seeks to defeat the Court's compulsory jurisdiction even after the Application has been filed in the case*. If, as the United States appears to intend, the 'determination' that the dispute concerns a matter essentially of domestic jurisdiction is to be made after an Application has been filed, it has retroactive effect and avoids the operation of the rule in the *Nottebohm* case.<sup>1</sup> Thus, under this form of escape clause, the establishment of the Court's jurisdiction in any particular case will depend on the willingness of the State concerned to submit to jurisdiction after the case has arisen, and the professed acceptance of compulsory jurisdiction in the declaration is illusory.<sup>2</sup> Regrettably, five other States<sup>3</sup> have already adopted this form of escape clause despite its wide condemnation by jurists.<sup>4</sup>

### *Subjective reservations concerning multilateral treaties*

The United States declaration contains another potentially subjective reservation because it excludes

'disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction'.

The effect of this reservation is far from clear. It was introduced into the United States declaration in the Senate, and the *travaux préparatoires* of the reservation do not indicate what exactly was its object.<sup>5</sup> Hudson takes the view that the Court would probably interpret the reservation by reference to Articles 62 and 63 of the Statute, which deal with the right of a third State to intervene in a case.<sup>6</sup> Article 62 allows a State to apply for leave to intervene when it 'consider[s] that it has an interest of a legal nature which may be affected by the decision in the case'. Article 63, on the other

*Reports*, 1952, p. 107) the Court held that recourse may be had to the *travaux préparatoires* of a declaration under the Optional Clause in order to ascertain the true intention.

<sup>1</sup> Page 261 above.

<sup>2</sup> In the previous volume of this *Year Book*, 31 (1954), pp. 133-4, the writer suggested that the declaration may be regarded as forming a useful basis for establishing jurisdiction on the principle of *forum prorogatum* rather than as a true acceptance of the Optional Clause.

<sup>3</sup> Mexico (1947), Pakistan (1948), France (1949), Liberia (1953), and India (1956).

<sup>4</sup> E.g. Preuss in *American Journal of International Law*, 40 (1946), pp. 720-36; Hudson, *ibid.*, 41 (1947), pp. 9-14; Wilson, *The International Law Standard in Treaties of the United States* (1953), p. 44; Oppenheim, *International Law*, vol. 2 (7th ed., by Lauterpacht, 1952), pp. 62-63.

<sup>5</sup> See Wilcox in *American Journal of International Law*, 40 (1946), pp. 714-16, and Quincy Wright, *ibid.*, 41 (1947), pp. 445-52.

<sup>6</sup> In *American Bar Association Journal*, 32 (1946), p. 832.

hand, gives a State an absolute right to intervene in a case whenever the construction of a multilateral treaty to which it is a party is in question. Hudson interprets Article 63 as laying down that, when the meaning of any multilateral convention is in issue in a case, every party to it has 'an interest of a legal nature which may be affected by the decision'. On that basis he concludes that in any case involving the interpretation of a multilateral treaty to which the United States is a party, the reservation requires every party to the treaty to have become a party to the case before the Court will be invested with compulsory jurisdiction over the United States. Lauterpacht expresses the same view of the effect of the reservation.<sup>1</sup> If this view is correct it means in practice that the reservation precludes the United States from being brought before the Court in a case involving the construction of a multilateral treaty unless it specifically consents to jurisdiction after the case has arisen.<sup>2</sup>

Dr. F. O. Wilcox maintains that the Senate did not have in mind so sweeping a reservation.<sup>3</sup> He suggests that by the words 'Parties to the treaty affected by the decision', the Senate meant parties 'directly affected' or 'legally affected' by the decision. On this basis, the reservation would not require all parties to the treaty, by reason only of their general interest in the construction of the treaty, to become parties to the case. Only those parties 'directly' or 'legally' affected by the decision as to the construction of the treaty would be required to be parties to the case. The distinction between parties 'directly' or 'legally' affected by the decision as to the meaning of the treaty and parties merely interested in the decision by reason of their general rights and obligations under the treaty, does not seem to be an easy one to draw. If a narrow interpretation is adopted of 'Parties affected by the decision', the effect of the reservation will be very small—much smaller than appears to have been intended by the Senate. If a broad interpretation is adopted, the practical effect will be much the same as under Hudson's view which has been set out above; the Court's jurisdiction will in each instance depend on an express submission to jurisdiction by the United States. If, as may well be the case, Dr. Wilcox's view of the meaning of the reservation is correct,<sup>4</sup> the uncertainty and difficulty attendant on its

<sup>1</sup> See Oppenheim, *op. cit.*, p. 63.

<sup>2</sup> States do not intervene in a dispute between other States unless they believe that a substantial interest of their own is at risk in the case. It will also be observed that the reservation requires all parties to the treaty to be parties to the case; but the United States itself would not be a 'Party to the case before the Court' *unless the Court already had jurisdiction over the United States with respect to the case.*

<sup>3</sup> See *American Journal of International Law*, 40 (1946), pp. 714-16. Dr. Wilcox acted as assistant to the Foreign Relations Committee of the Senate.

<sup>4</sup> Professor Quincy Wright supports Dr. Wilcox and seems even to go somewhat farther; see *American Journal of International Law*, 41 (1947), pp. 445-52. By elaborate and not altogether convincing reasoning, he seems to conclude that the real point of the reservation is to guard against an arbitrary exercise by the Court of its discretion, under Article 62, to refuse intervention by a



application will still leave the legal effect of the reservation obscure and the establishment of the Court's jurisdiction dependent on the will either of third States or of the United States itself. The reservation has been generally condemned as tending to withdraw from the Court, at the will of the United States, a large fraction of the legal disputes covered by the Optional Clause, because a sensible proportion of international disputes 'arise under a multilateral treaty'. Nor does the United States appear to have had any solid reasons for making the reservation, which seems only to have been inspired by vague fears and misconceptions as to the working of the Optional Clause in a case arising under a multilateral treaty. If adopted by other States, the reservation might seriously prejudice the effectiveness of the Optional Clause system of compulsory jurisdiction in a most important sphere of legal disputes. Fortunately, it has so far been adopted only by Pakistan.<sup>1</sup>

*Reservation of a right to vary by giving notice*

Attention has been drawn above<sup>2</sup> to the use that may be made of a right to terminate a declaration, by notice to the Secretary-General, for the purpose of varying the terms of the declaration. Portugal in a recent declaration, dated 19 December 1955,<sup>3</sup> has introduced a new escape device. She has made her declaration for one year and from then on until notice of termination is given and has, in addition, reserved the right at any time to exclude from the scope of her declaration 'any given category or categories of disputes by notifying the Secretary-General of the United Nations and with effect from the moment of such notifications'. By this reservation Portugal appears to have arrogated to herself the right to vary the scope of her acceptance of compulsory jurisdiction at any time during the currency of her declaration and with respect to any categories of disputes.

A reservation in the Portuguese form sets up a position analogous to that under a declaration immediately terminable on notice, and is open to all the same objections. The State concerned, as soon as it sees the possibility that an attempt may be made to start proceedings against it in regard to a particular matter, is able to take avoiding action by notifying the Secretary-General of the exclusion of that category of matters from its declaration. At first sight, indeed, this form of reservation appears to render the acceptance of compulsory jurisdiction completely illusory. Such

third State which considers itself to have an interest of a legal nature affected by the decision. Apart from the fact that when the case involves the construction of a multilateral treaty the Court under Article 63 has no such discretion, it may be doubted whether the Senate had any appreciation of the subtle argument advanced by Professor Wright.

<sup>1</sup> Pakistan declaration of 1948; see *Year Book of the International Court of Justice*, 1954-5, p. 196.

<sup>2</sup> At pp. 265-8.

<sup>3</sup> Presumably to be published in the 1955-6 *Year Book of the International Court of Justice*

would certainly be the case if retroactive effect were claimed for any future notification of a reservation, and a declaration which made this claim could hardly be regarded as an acceptance of the Optional Clause at all. The Portuguese reservation, however, expressly states that any future reservation is to have effect only from the date on which it is notified to the Secretary-General. This means that Portugal's acceptance of compulsory jurisdiction holds good with respect to any category of matters until the exclusion of that category has been notified to the Secretary-General. Accordingly, under the rule in the *Nottebohm* case,<sup>1</sup> the filing of an Application with respect to any particular matter within the category would be effective to bind Portugal to submit to the Court's jurisdiction, and the subsequent notification of a reservation would be of no avail to put a stop to the proceedings. The introduction of this form of reservation is nevertheless to be condemned as tending to frustrate the purpose of the Optional Clause in the same way and to much the same extent as a provision whereby a declaration is made immediately terminable by notice to the Secretary-General. A declaration, like that of Portugal, in which both these forms of escape clause are combined, must be regarded as hardly more than a nominal acceptance of compulsory jurisdiction.

*Other reservations of broad and uncertain scope*

A number of other reservations leave the scope of the compulsory jurisdiction accepted by the State concerned in considerable uncertainty. Amongst these, attention may be drawn to two reservations made respectively by Salvador in 1921 and Israel in 1950.<sup>2</sup> The Salvador reservation excludes 'disputes or differences concerning points or questions *which cannot be submitted to arbitration in accordance with the political constitution of Salvador*'. The Israel declaration is a strange one, for it excepts all disputes which 'involve a legal title created or conferred by a government or authority other than the Government of the State of Israel or an authority under the jurisdiction of that Government'. Space does not permit an examination of the legal effect of these reservations. It may, however, be observed that the Salvador reservation would appear to mean that Salvador, if she wishes, may vary the scope of her acceptance of the Optional Clause by amending her Constitution.

§ 7. *Reciprocity and escape clauses*

The primary meaning of the condition of reciprocity contained in the Optional Clause, it has been seen in § 4 above, is that for the Optional Clause jurisdiction to apply to a particular dispute, both States must have

<sup>1</sup> See above, p. 261.

<sup>2</sup> *Year Book of the International Court of Justice*, 1954-5, at pp. 191 and 193, respectively.



made a declaration which comprises the particular dispute within its scope. It was also seen<sup>1</sup> that the operation of the condition of reciprocity had been worked out with special reference to conditions, reservations and limitations in regard to which reciprocity means that a State may always invoke a provision in its opponent's declaration for the purpose of excluding a particular dispute from the application of the Optional Clause jurisdiction. It is, therefore, beyond question that an escape clause in the form of a reservation operates in a particular dispute not only in favour of the State which made it but also in favour of its opponent. A reservation, for example, by State *A* of disputes in regard to matters which are essentially within its domestic jurisdiction as determined by itself, if it is not invalid, arms every other State with the power, whenever a dispute arises with State *A*, to 'determine' the matters in issue to be within its own domestic jurisdiction and, by so doing, to oust the Court's compulsory jurisdiction. The principle of reciprocity requires that escape clauses in the form of reservations should work both ways. It was, however, pointed out in the previous volume of this *Year Book*<sup>2</sup> that in the case of subjective reservations of this kind the reciprocity may be more apparent than real. One State, by reason of its legal convictions or its other interests, may find it impossible to designate a certain class of matters as 'matters essentially of domestic jurisdiction', whereas another State may have less scruples about pursuing a purely opportunist policy in determining a matter to be a matter within its domestic jurisdiction for the sole purpose of avoiding compulsory jurisdiction in an individual case. This is in itself an additional objection to the admissibility of subjective reservations in declarations under the Optional Clause.

The Portuguese reservation, which asserts a right to qualify the acceptance of compulsory jurisdiction at any time by notifying new reservations, brings out the importance of the bilateral rather than multilateral character of the reciprocal obligations established between States under the Optional Clause.<sup>3</sup> The condition of reciprocity confers upon every other State adhering to the Clause the right, *vis-à-vis* Portugal, to qualify its acceptance of compulsory jurisdiction by notifying new reservations. But any such notification of a new reservation would be ineffective to alter the obligations of the State concerned under the Optional Clause with respect to any State other than Portugal. The right to make the new reservation has its sole foundation in the right to complete reciprocity with Portugal, and exists only with respect to Portugal. Reciprocity requires, but only requires, that each State should have the right to make new reservations *excluding particular categories of disputes with Portugal* from its acceptance of compulsory jurisdiction under the Optional Clause.

<sup>1</sup> Page 257 above.

<sup>2</sup> 31 (1954), at p. 135.

<sup>3</sup> See above, p. 254.

The operation of reciprocity in regard to time-limits has not, as yet, provoked much discussion. It is inherent in the Optional Clause system of compulsory jurisdiction that it requires both States to be simultaneously subject to the Clause before the jurisdiction can be invoked. In other words, the system requires reciprocity of obligation to exist at the date when the Application is filed in a case, which means that both declarations must be current at that date. Both declarations must concur in comprising the date of the filing of the Application within the periods of their validity. In regard to the time factor, therefore, reciprocity primarily means that the duration of the mutual obligations—the juridical bond—between any two States under the Optional Clause is limited to the joint period during which both declarations are in force. For example, in the *Electricity Company of Sofia and Bulgaria* case,<sup>1</sup> Bulgaria's declaration, made in 1921, was without time-limit, while that of Belgium, made on 10 March 1926, was to run for a period of fifteen years; and Judge Anzilotti referred to the two declarations as combining to create an agreement between the two States whose duration was fifteen years from 10 March 1926.

There is, however, another aspect of reciprocity in regard to time-limits which seems to deserve attention, since it may well assume importance in view of the increasing number of declarations which are immediately terminable on notice to the Secretary-General. Reciprocity would seem to demand that in any given pair of States each should have the same right as the other to terminate the juridical bond existing between them under the Optional Clause. This is so even in the ordinary case where State *A*'s declaration is without time-limit while State *B*'s is for a period of five or ten years. State *B* at the end of the period may choose whether to renew or to terminate its obligations towards State *A* under the Optional Clause. State *A* may reasonably contend that, while not retracting its general acceptance of the Optional Clause, it also is entitled at the end of the period to choose whether or not to continue its particular obligations towards State *B*. It is one thing to hold that a unilateral declaration made without time-limit binds the State concerned indefinitely toward other States which have made similar declarations. It is quite another thing to hold that such a unilateral declaration is binding indefinitely towards other States which have not undertaken the same commitment. The inequality in the positions of the two States under the Optional Clause, if the principle of reciprocity is not applied to time-limits, becomes absolutely inadmissible when State *A*'s declaration is without time-limit while that of State *B* is immediately terminable on notice to the Secretary-General. It would be intolerable that State *B* should always be able, merely by giving notice, to terminate at any moment its liability to compulsory jurisdiction *vis-à-vis* State *A*, whilst the

<sup>1</sup> (1939): Series A/B, No. 77.



latter remained perpetually bound to submit to the Court's jurisdiction at the suit of State *B*. The Court has not yet had occasion to examine this aspect of the operation of reciprocity in relation to time-limits. In the light, however, of its interpretation of the condition of reciprocity in regard to reservations, the Court, it is believed, must hold that under the Optional Clause each State, with respect to any other State, has the same right to terminate its acceptance of compulsory jurisdiction as is possessed by that other State.

The point can, perhaps, be illustrated by considering the declarations of Norway, Sweden and the United Kingdom in the year 1950, when the United Kingdom filed its Application in the *Anglo-Norwegian Fisheries* case.<sup>1</sup> At that date, the United Kingdom's declaration was terminable on notice to the Secretary-General, while those of both Norway and Sweden had fixed time-limits expiring in 1956. Assuming the application of reciprocity to time-limits, Norway would then have been entitled to give notice to the Secretary-General of the termination of her declaration with respect to the United Kingdom in virtue of the right of termination contained in the latter's declaration. If she had done so before the filing of the United Kingdom's Application in the case, she would have defeated the Application. *On the other hand, the termination of her declaration vis-à-vis the United Kingdom would have left her declaration in full force vis-à-vis Sweden.* A question might be raised as to whether Norway's termination of her declaration would operate only with respect to the United Kingdom or also with respect to all other States which had reserved a right of termination upon notice to the Secretary-General. It seems clear, however, that if Norway had purported to terminate her obligation under the Optional Clause only with reference to the United Kingdom and on the basis of a right derived reciprocally from the United Kingdom's declaration, Norway's declaration would remain in full force with respect to other States. The relations established between States under the Optional Clause, as has been emphasized,<sup>2</sup> are of a bilateral rather than multilateral character. A notification to the Secretary-General intended to alter State *A*'s obligations with respect only to State *B* has no effect therefore on State *A*'s obligations under the Optional Clause with respect to other States. To allow a State, on the ground of reciprocity in regard to time-limits, the right to terminate its obligations under the Optional Clause with reference only to a particular State or States may add to the complexity of the Optional Clause system. To refuse it such a right would, however, be to establish a gross inequality between States in regard to the termination of their obligations under the Optional Clause.

<sup>1</sup> *I.C.J. Reports*, 1951, p. 116.

<sup>2</sup> See above, p. 254.

§ 8. *The position of a State which refrains from making a declaration*

A State which is a party to the Statute of the Court but does not make a declaration under the Optional Clause is in a highly favoured position. Acceptance of the Statute by itself carries no liability to appear in front of the Court in a contentious case at the suit of another State. Before it can come under any liability to appear as defendant in a case, a State must specifically have accepted the Court's contentious jurisdiction either by treaty or by unilateral declaration under the Optional Clause. On the other hand, the mere fact that a State is a party to the Statute gives it the power, under the Optional Clause, at any moment to put itself into the position of being able instantly to bring before the Court any States which have already subscribed to the Optional Clause in any case covered by the terms of their declarations. Being a party to the Statute, it has the right under the Optional Clause *at any time and without reference to any other State* to make a declaration recognizing the compulsory jurisdiction of the Court in relation to States which also subscribe to the Optional Clause. If it does so, it automatically has the right to use the procedure provided in Article 40 (1) of the Statute and Article 32 (2) of the Rules and, by filing an Application with the Registrar, may at once bring before the Court compulsorily any other State which subscribes to the Optional Clause in any case covered by the terms of its own and its opponent's declarations. The making of the declaration, its deposit with the Secretary-General of the United Nations and the filing of the Application can all be effected within a single day. Assuming that the case in fact falls within the terms of the declarations of the plaintiff and defendant States, the filing of the Application establishes immediately and conclusively the jurisdiction of the Court over the case. Accordingly, so far as concerns the power to institute proceedings under the Optional Clause against another State, a party to the Statute which refrains from making a declaration is in almost the same position as the State which in good faith has undertaken a general obligation to submit to compulsory jurisdiction for a substantial, or even indefinite, period of years.

There is, in consequence, a glaring inequality in the position of a State which does and a State which does not make a declaration under the Optional Clause. The former State, for practical purposes, is continuously liable to be brought before the Court compulsorily at the suit of the latter, whereas the latter is not liable to be brought before the Court at the suit of the former unless and until it chooses to initiate proceedings before the Court as plaintiff and makes a declaration under the Optional Clause *ad hoc* expressly for that purpose. This fundamental lack of reciprocity between the positions of States which do and States which do not make declarations is aggravated by the fact that it seems to be open to a State



which is driven to make a declaration in order to institute proceedings as plaintiff, to exploit its opponent's general commitment under the Optional Clause without itself undertaking much more than a nominal commitment. Thus, the Statute and the Rules do not in terms preclude a State which hitherto has held itself entirely aloof from the Optional Clause from making a declaration for a token period of 12, 6, or even 3 months for the sole purpose of instituting proceedings against another State in a particular case, and from then filing an Application in the case. On the expiry of the token period, while the rule in the *Nottebohm* case<sup>1</sup> would maintain the Application before the Court until a final judgment had been pronounced in the case, the plaintiff State, by the lapse of its declaration, would have regained its former total immunity from process under the Optional Clause. Similarly, the Statute and Rules do not in terms preclude a State which is anxious to submit a particular case to the Court from making a declaration expressed only to run 'until notice of termination is given', leaving itself free to put an end to its acceptance of the Optional Clause as soon as it has achieved its object. Indeed, the letter of the Statute might be claimed to permit a State to make a declaration today, file an Application in a particular case immediately afterwards, and tomorrow give notice to terminate the declaration. Opportunism so flagrant would, it is believed, be open to challenge on the grounds of a manifest lack of *bona fides* in making the declaration and of a total absence of reciprocity between the States concerned. But, leaving aside such a *reductio ad absurdum* case, it seems clear that a State may hold aloof for years from the compulsory jurisdiction of the Court under the Optional Clause and then make a declaration *ad hoc* for a particular case in a form which involves it in only a very transient acceptance of the Clause.

Admittedly, a State which makes a declaration even for a very brief period exposes itself during that period to the risk of being dragged before the Court by any State which has subscribed to the Optional Clause, and this risk might cause some States to hesitate before venturing on a declaration under the Optional Clause. Since, however, a State is free, by reservations and conditions, to place drastic limits upon the categories of matters covered by its declaration, it could usually so frame the latter as to include the particular dispute in which it sought to be plaintiff and yet exclude other disputes in respect of which it felt itself to be vulnerable. Indeed, if the United Kingdom's declaration of 1946 regarding the boundaries of British Honduras is a valid form of declaration, it may be open to a State in terms to limit the scope of its declaration to the category of matters with which the particular case in which it seeks to be plaintiff is concerned. Again, such a very particular and opportunist declaration may

<sup>1</sup> See above pp. 263 -

be open to challenge on the ground of a manifest lack of reciprocity between the two States under the Optional Clause. But a State which does not go to quite such absurd lengths can quite easily frame the scope of its declaration so as to enable it to take advantage of the Optional Clause jurisdiction for a particular case, without exposing itself to any substantial risk of being forced into Court under the Clause in another case.

Under the Optional Clause, therefore, the State which refrains from making a declaration may sit immune on the side-lines and yet, when the moment is favourable, descend for a brief space of time on to the field of play to pounce upon one of the unsuspecting States already there and afterwards speedily return to its secure seat on the side-lines. The result is that so long as a fair number of States are subscribers to the Optional Clause, which is the position today, there is really no point at all in adhering to the Clause in advance of an actual case. The State which does not make a declaration now has the best of both worlds. It is not, therefore, to be wondered at that, despite the very large majority at the San Francisco Conference in favour of giving the new International Court of Justice compulsory jurisdiction for all legal disputes, there have been so few new subscribers to the Optional Clause. Still less is it to be wondered at that there has been an increasing tendency amongst those States which have subscribed to the Optional Clause to introduce into their declarations escape or hedging clauses leaving them the maximum freedom of manœuvre when faced with the threat of proceedings in an actual case. Indeed, the highly privileged position of the State which does not make a declaration goes a long way to justify the use of declarations immediately terminable by notice and even attempts to frame reservations which will enable the State concerned, if it thinks fit, to decline jurisdiction in individual cases. Regrettable and retrograde though these devices may be, it seems idle to make a great outcry about them without first doing something to ensure a greater degree of reciprocity between States which regularly subscribe to the Optional Clause and States which prefer normally to stay immune from compulsory jurisdiction.

A State has, in fact, a means of protecting itself against the State which remains outside the Optional Clause and then suddenly has recourse to it for the purpose of starting proceedings in a particular case. It need only insert in its own declaration a reservation excluding 'all disputes with a State which at the date of the ratification of the declaration has not accepted the Optional Clause, except disputes which arise after the acceptance of the Optional Clause by that State and with regard to situations or facts subsequent to the said acceptance'. Such a reservation would simply be the normal formula for a limitation *ratione temporis* so drawn as to exclude disputes already in existence at the date of any subsequent declara-



tion by another State, instead of the usual exclusion of disputes already in existence at the date of the State's own declaration. The double form of reservation—'disputes which arise after the acceptance of the Optional Clause with regard to situations or facts subsequent to the said acceptance'—would effectively prevent a State from making a declaration under the Optional Clause for the sole purpose of starting proceedings in a particular case.<sup>1</sup> Alternatively, the reservation might be framed on the lines of the amendment to the Statute which is suggested on p. 286 below.

If it is true that the making of a temporary declaration for the purpose of taking an individual case to the Court has not yet been a feature of State practice under the Optional Clause, there is a real risk of such a development. On 19 December 1955, Portugal made a declaration valid for twelve months and thereafter until notice of termination is given, deposited the declaration with the Secretary-General on the same day, and within three days had filed an Application against India in regard to alleged Portuguese rights of passage over Indian territory. It can, no doubt, be urged in Portugal's favour that she had only recently become a party to the new Statute. Moreover, India's declaration was terminable by notice to the Secretary-General. Even so, her lightning declaration and Application in this case sets an ominous precedent and illustrates the possibilities of abuse of the Optional Clause in an individual case by a State not itself previously liable to compulsory jurisdiction.<sup>2</sup>

### § 9. *The Optional Clause system today*

That there has been a sensible decline in the quality of State practice under the Optional Clause is manifest. If the tendencies discussed in the present article continue, the large majority of declarations will become terminable either immediately or on short notice, while a number will contain particular escape clauses. There appears even to be some danger that the attitude of States towards the Optional Clause may degenerate into one of pure opportunism, declarations being made, cancelled and varied as the immediate interests of each State may dictate. It is, therefore, proposed to conclude this article with a brief reappraisal of the Optional Clause system of compulsory jurisdiction.

The Optional Clause came into existence for the very reason that some

<sup>1</sup> At the same time, the reservation would not cut out new disputes arising in regard to past situations or facts, unless the past situation or fact was the *source* of the dispute in the sense that it had really started the dispute. Thus, the limitation would only cut out disputes which were already developing before the second State made its declaration.

<sup>2</sup> The immediate filing of Portugal's Application raises in addition an interesting question of reciprocity, since in her declaration she reserved the right at any time in the future to make reservations. The immediate filing of the Application, in part at least, stultified India's reciprocal right to make use of this reservation in Portugal's declaration.

States, especially the Great Powers, would not undertake in advance to submit legal disputes of any importance to settlement by an independently elected tribunal administering international law. It constituted an invitation to States to pluck up courage and undertake this commitment even if only for a trial period and even if only for a limited range of disputes. The mistake, if it was a mistake,<sup>1</sup> was to make the undertaking of this commitment a wholly unilateral act, and then to give an almost complete discretion to each State as to when and for how long and on what conditions it would undertake the commitment. The virtual absence of any restrictions as to the terms on which a State might adhere to the Optional Clause, while it might open the gate to a larger circle of adherents, was calculated to give full rein to those nervous fears and political inhibitions which weigh upon Governments called upon to submit the interests of their State to determination by an independent, external, authority. It was also calculated to make State practice under the Optional Clause sensitive to the barometer of international confidence in (1) the Court as a judicial tribunal and (2) the order and stability of international affairs.

After 1920, as confidence in the Court grew, a slowly widening circle of States adhered, and the prospect of establishing eventually a general system of compulsory jurisdiction through the Optional Clause did not appear altogether visionary. The adherence of Great Britain in 1929 provided a strong stimulus to acceptance of the Optional Clause by other States. At the same time, however, it provided a sharp reminder of the distance which had yet to be travelled before complete submission to the judicial process became an integral part of the international order. Great Britain was a State with large and varied interests at stake and she made free use of the power given in the Optional Clause to frame the terms of her submission to jurisdiction to suit her own circumstances. Other States followed her example; and as the limitations, reservations and conditions multiplied, the ambit of the Optional Clause system of jurisdiction contracted. Meanwhile, the rapid deterioration in international relations in the 1930's resulted in a general waning of confidence in international action, and a number of States which had accepted the Optional Clause for limited periods allowed their acceptances to lapse.

At the San Francisco Conference there seems to have been little disposition to remove the serious weaknesses inherent in the Optional Clause by reason of the virtually unrestricted power permitted to each individual State of framing the conditions of its adherence to the Clause. The question was raised in a sub-committee by Canada and Australia, the latter

<sup>1</sup> It is arguable that the almost invincible repugnance of many States to submitting their interests to decision by an external body made it essential to give the widest possible discretion in the framing of declarations under the Optional Clause, if there was to be any prospect of a general acceptance of compulsory jurisdiction.



proposing that there should be an exhaustive list of permitted reservations, on the lines adopted in the General Act of Geneva of 1928.<sup>1</sup> But the sub-committee voted in favour of maintaining the existing text of the Optional Clause, while it also emphasized that this text had been interpreted as authorizing the making of reservations. When another Great Power with large and varied interests at stake, the United States, brought itself to adhere to the Optional Clause in 1946, it also made free use of its right unilaterally to frame the conditions of its acceptance of the Clause. It is debatable, as has been pointed out above,<sup>2</sup> whether the United States did not in fact go beyond even the wide liberty of making reservations which the Optional Clause allows. However that may be, the conclusion is almost inevitable that the fabric of the Optional Clause system of jurisdiction has been more weakened by the introduction into it of the United States reservations than it has been strengthened by the adhesion of another Great Power. There has been no such general widening of the circle of States bound by the Optional Clause as might compensate for the depreciation in the quality of acceptances of the Clause under the new Statute.

It is comparatively easy to point out the technical defects of the Optional Clause and to suggest remedies. First, there is the absurdity of a system of compulsory jurisdiction which permits a right of immediate termination of the obligation by unilateral act. The remedy would be to tighten up the time-limit provision in Article 36 (3) and to require declarations to be made for not less than a specified minimum period. The ideal minimum would be five years, but something a little less stringent may be more in keeping with the coy attitude of States towards the Optional Clause. A provision requiring declarations to be made either for a minimum period of two years or until not less than one year's notice of termination is given could hardly be considered unduly strict and yet would prevent the opportunist contracting in and out which is possible under the present Statute.

Secondly, there is the virtually unfettered power to restrict the scope of declarations by limitations, reservations and conditions. The remedy would be that proposed by Canada and Australia, namely, to allow only specified kinds of authorized exceptions, on the lines of the General Act of Geneva. The General Act list leaves open a decidedly wide range of reservations but it does, at least, attempt to exclude vague and subjective reservations such as now threaten to undermine the Optional Clause system.<sup>3</sup>

<sup>1</sup> Report of Sub-committee D of Committee 1 of Commission IV; U.N.C.I.O., vol. xiii, p. 558.

<sup>2</sup> Pp. 271-5.

<sup>3</sup> Article 39 of the General Act reads as follows:

'1. In addition to the [condition of reciprocity], a Party, in acceding to the present General

Thirdly, there is the anomaly that a State which has deliberately remained outside the Optional Clause system may yet by a stroke of the pen put itself into a position instantly to institute proceedings under the Clause. Opinions may differ as to whether any provision should be introduced into the Statute to put an end to this anomaly, since the 'condition of reciprocity' would make any restriction imposed on a newcomer operate both ways. Moreover, as pointed out above,<sup>1</sup> it is already possible for a State, if it wishes, to guard against an opportunist declaration on the part of an outsider by means of an appropriate limitation *ratione temporis*. It is, however, believed that a specific statutory provision is desirable because the present position is both palpably unfair to States which are genuine adherents to the Optional Clause system and is a positive encouragement to other States to remain outside the system. An appropriate rule is not easy to formulate, but the insertion at the end of Article 36 (2) of a proviso on the following lines might, perhaps, serve:

'Provided that for a period of two years after the date when any such declaration comes into force it shall not have effect with respect to a dispute concerning matters which were the subject of differences between the Parties during the two years immediately preceding that date.'

Such a provision would cut out the worst kinds of opportunism without making too large an inroad into the Court's jurisdiction over 'past' disputes.

The technical weaknesses of the Optional Clause are matters which merit attention even although, in the present state of international relations, there may not be much prospect of removing them by amendment of the Statute of the Court. It would, however, be naïve to suppose that these weaknesses are a principal cause of the decline of the Optional Clause system of jurisdiction. During the life of the present Court the extreme tension between the Soviet and the Western blocs, the revolutionary political changes in some parts of the world, and the greater fluidity of international law itself, have combined to create an international climate unfavourable to the development of the Optional Clause system. These influences have not left the Court itself altogether untouched, and it may

Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

'2. These reservations may be such as to exclude from the procedure described in the present Act:

*a.* Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

*b.* Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

*c.* Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.'

<sup>1</sup> Page 282.



be doubted whether the new Court has yet gained for itself the full measure of confidence which the old Court enjoyed. At any rate, until a greater sense of security and solidarity has returned to the international community, expansion of the Court's compulsory jurisdiction by unilateral action under the Optional Clause is hardly to be expected. The immediate objective must rather be to prevent the further deterioration of State practice in framing the terms of declarations, which, if not checked, may bring the whole system into disrepute and produce not an expansion but a contraction of the Court's compulsory jurisdiction under the Optional Clause. If this objective is achieved, the Optional Clause may still serve the useful, if limited, purpose of providing a basis for the exercise of the Court's jurisdiction in a number of particular cases.

## NOTES

### THE CASE OF FEIVEL PIKELNY<sup>1</sup>

ON 15-16 June 1940 Soviet forces occupied the Baltic States of Estonia, Latvia, and Lithuania. In Lithuania, a new Government was elected, which on 3 August 1940 decided to join the Union of Soviet Socialist Republics. On 22 June 1941 Germany invaded the U.S.S.R. On 17 August 1941 the German army entered Kovno, Lithuania. On that day, and again on 28 October 1941, the German police rounded up some thousands of Jews living in Kovno and marched them to the outskirts of the city, where they were massacred by machine-gun fire. Among those murdered on the second occasion were Feivel Pikelny, his wife, and his two children, all of whom were domiciled in Lithuania.

Pikelny left certain estate in England, and in 1955 application was made on behalf of his next of kin, four brothers and a sister, resident in the United States of America, to the English High Court for a grant of administration to the estate of the deceased in England. When the application came before Mr. Justice Karminski, it was explained that it was made by persons who according to English law would be entitled to a grant of administration as next of kin. Where a person had died domiciled abroad, however, the grant had to be made according to the law applicable in the country of domicile at the date of death, namely, to the person who would be entitled to administer by the law of the deceased's domicile. The question which arose, therefore, was: What was the law of Lithuania in October 1941?

Evidence was filed by a lawyer who had formerly practised in Memel, to the following effect. Before the First World War, Lithuania was part of Russia and the laws then in force were contained in the Imperial Russian Code of 1832. After 1919, Lithuania, then an independent Republic, retained only part of the Code, including that contained in what was known as Volume 10, which contained the law relating to succession. Under the Code the present applicants were in the circumstances of Pikelny's death entitled to his estate.

In 1940 Soviet law was introduced into Lithuania, and under that law the property of Mr. Pikelny became the property of the State. (How that came about does not appear, and it remains a matter for speculation whether it was as the result of some kind of confiscation, or by reason of the exclusion of kin outside the country enabling the State to take as *ultimus heres*, as did the Spanish State in *In the Estate of Maldonado*, [1953] 2 All E.R. 300 and 1579, or because the property was *bona vacantia*, or in some other way.)

Counsel for the applicants at first suggested, perhaps only to dispose of the point, that at the date of Pikelny's death Lithuanian law might be said to be that of German occupation decrees. Mr. Justice Karminski observed that English law would not recognize as law decrees made by an enemy invader. This must, it is submitted, be understood as referring to decrees which purported to alter the laws of succession. An Occupant has no power to do any such thing. He exercises for the time being military authority over the territory occupied and the temporary right of administration over it and its inhabitants. But he does not acquire sovereignty over it. Under Article 43 of

<sup>1</sup> *In the Estate of Feivel (otherwise Faivel) Pikelny deceased, ex parte Max Pikelny and Others* (unreported save in *The Times* newspaper, 30 June and 1 July 1955). I am indebted to the Solicitors for the applicants for their ready assistance in the preparation of this Note.



the Hague Regulations, the Occupant is bound to respect, unless absolutely prevented, the laws in force in the occupied territory. In particular, he is bound to alter or override the existing laws as little as possible and only so far as may be necessary for the maintenance of order and the safety of his forces. Any decree purporting to alter the laws of succession in the territory would not comply with Article 43; it could not be justified by necessity and therefore would be illegal and hence not recognized or given effect to by the English courts, who regard Hague Convention No. IV of 1907 as binding upon them—see *Porter v. Freudenberg*, [1915] 1 K.B. 857, 874. It is not known whether the German occupation authorities introduced their own law of succession. It is in the nature of things doubtful whether they did. But if they did introduce any such law, it could properly be ignored in the courts of every other country.

With regard to the law imposed by the Soviet Government in 1940, Counsel submitted that 'the English courts would not recognize law laid down as the result of the usurpation of a government at a time when that government was not recognized *de facto* or *de jure* by her Majesty's Government. If that were the correct view it would be necessary to refer to the prior law, which was that of the Lithuanian Republic.' Counsel added that the present position of Lithuania was recognized after the end of the war, and there was authority for the proposition that such recognition related back to the date of the establishment of the Government concerned. He went on to say that 'Any relation back, however, could only be to the re-occupation of Lithuania by the Soviet forces towards the end of the war and not to the 1940 occupation.' This, with respect, is difficult to understand; if Russia assumed sovereignty over Lithuania in 1940, she retained that sovereignty throughout the German occupation. It is clearly established that belligerent occupation is a provisional state of affairs; it does not displace or transfer sovereignty (McNair, *The Legal Effects of War*, 2nd ed. (1949), pp. 320, 341). The moment the invader evacuates the territory, the former condition of things *ipso facto* revives. The territory is once again considered to be under the sway of the legitimate sovereign (see Oppenheim, *International Law*, vol. ii (7th ed., 1952), p. 618). If it is correct to say that the recognition of Russian sovereignty over Lithuania relates back to the establishment of that sovereignty, there can be no reason for bringing forward the retroactive effect of recognition to a date some years afterwards, Russian sovereignty having meanwhile continued to exist.

At this point his Lordship inquired what was the date of the recognition of the present Government of Lithuania and suggested that the information be obtained from the Foreign Office. The Solicitors for the applicants had, however, already written to the Foreign Office, and received the following reply:

'Gentlemen,

'I am directed by Secretary Sir Anthony Eden to reply to your letter of the 22nd of February concerning the case of Feivel Pikelný deceased, and to furnish you with the following statement of Her Majesty's Government's position with regard to the annexation of Lithuania by the Union of Soviet Socialist Republics.

'I am to state that Her Majesty's Government recognize the Government of the Lithuanian Soviet Socialist Republic to be the *de facto* Government of Lithuania, but do not recognize it as the *de jure* Government of Lithuania. Her Majesty's Government recognize that the Republic of Lithuania as constituted prior to June 1940 has ceased *de facto* to have any effective existence. The effect of such recognition and in particular the date to which it should be deemed to relate back would be questions for the Court to decide. On request from the Court a certificate setting out the position as stated above would be furnished to the Court.

'With regard to the Lithuanian Legation in London, I am to state that although the

Representatives of the former Lithuanian Government have remained in London, Her Majesty's Government do not recognize them in any representative capacity.'

Counsel therefore informed the Court that the Foreign Office found some difficulty in saying on what precise date the *de facto* recognition of the Lithuanian Soviet Socialist Republic had taken place and an adjournment was granted in order that the question might be answered, if possible, *ex aliunde*. When the hearing was resumed, Counsel referred to a passage in *Hansard* for 10 February 1947 (433 *H.C. Deb.*, 5 s., col. 5). Upon a Member of the House of Commons asking whether His Majesty's Government had ever approved of the incorporation of Estonia, Latvia, and Lithuania in the U.S.S.R., the Minister of State, replying for the Secretary of State for Foreign Affairs, said: 'No, Sir. His Majesty's Government recognize that the Baltic States have *de facto* been absorbed into the Soviet Union but have not recognized this *de jure*.' On hearing this, his Lordship said that he was satisfied that the *de facto* recognition of the present Lithuanian Government had taken place on or about 10 February 1947, some five years after the death of the deceased. He was therefore prepared to grant letters of administration in favour of those who would have been the next of kin according to English law, 'that being the law of the Lithuanian Republic'.

Certain features of this case appear to call for comment. The first, and the most striking, is the acceptance by the Court of an extract from *Hansard*, the House of Commons Official Report, as evidence of the recognition by the British Government of the 'absorption' of Lithuania into the U.S.S.R. It having been early realized that it was necessary for such recognition to be proved, the Solicitors for the applicants had, as we have just seen, in accordance with the accepted procedure asked the Foreign Office for the required information. All that they received from the Foreign Office was, however, a 'statement of Her Majesty's Government's position with regard to the annexation of Lithuania by' the U.S.S.R., which cannot have been of much assistance to them. In giving the statement the Foreign Office was following the established practice of giving a 'temporizing' certificate when it is not able to provide the information required by or for the Court. Such a certificate may be given when, as here, the question relates to events which have happened in 'changing and difficult times'—the expression used by Lord Sumner in *Duff Development Co., Ltd. v. Kelantan Government*, [1924] A.C. 797, at p. 824.

On the question of the date of the recognition of the Russian as the present Government of Lithuania, clearly the best evidence available is that of the Crown which had so recognized the Russian Government (if, indeed, it had). But if the Crown, through the Foreign Office, is unable or unwilling from motives of policy to provide that evidence, what is the litigant to do? Where is he to turn for other, secondary, evidence? Where, indeed, outside the Foreign Office, is evidence to be found of what the Crown has done by way of recognizing a foreign régime? And if other evidence is found, will the Court accept it? In *Bogusławski and Another v. Gdynia Ameryka Linie Żeglugowe Spółka Akcyjna*, [1953] A.C. 11, at p. 27, Lord Porter said: 'The proof of recognition must depend on the production of a certificate from the Foreign Secretary of this country pronouncing the fact of recognition', but the noble Lord did not contemplate the possibility of the Foreign Secretary's not furnishing a certificate for production.

In the case of *Pikelny*, the applicants turned for information to *Hansard*. Now, Parliamentary Journals, signed by the Speaker of the House of Commons, are provable under the Evidence Act, 1845, Section 3 (and see *Phipson on Evidence*, 9th ed. (1952), p. 577), but *Hansard's Debates* are not the Parliamentary Journals. The latter are 'signed by the Speaker and do not give the speeches' (*per* Darling J., who refused to



admit them as evidence in *McCarthy v. Kennedy*, *The Times* newspaper, 4 March 1905. Similarly, in *Tranton v. Astor* (1917), 33 *T.L.R.* 303, Low J. refused to receive as evidence volumes of *Hansard*, and shorthand writers were called who produced their original shorthand notes of speeches made in the House). It must therefore have been with a sense of novelty that Counsel for the applicants put forward the extract from *Hansard* quoted above, and that the Court received it. For after all, it was something very like hearsay evidence—which may be defined as an oral or written statement made by persons who are not parties to a suit and are not called as witnesses. To the rule that hearsay evidence is inadmissible in an English Court, State papers such as Parliamentary Journals, and official certificates such as a certificate or a letter from a Secretary of State, are exceptions. *Hansard* is not. Nearly forty years previously, in *In re Suarez*, [1918] 1 Ch. 176, a communication of the Foreign Office concerning the status of a diplomatic person was attacked as being hearsay. (The contention was rejected.) It is true that in *Haile Selassie v. Cable and Wireless Ltd.* (No. 2), [1939] Ch. 182, Counsel for the defendant Company informed the Court that an announcement had been made on the previous day by the Prime Minister in the House of Commons that it was the intention of His Majesty's Government in a very short time to recognize the King of Italy as *de jure* Emperor of Abyssinia; on hearing this the Court adjourned. But that was a measure of practical convenience; the Court did no more then, and a few days later the appellant's Solicitors received a certificate from the Foreign Office stating that His Majesty's Government recognized the King of Italy as Emperor of Abyssinia.

Indeed, the English courts have always been most conservative in their choice of means for ascertaining 'facts of State'. Inquiry of the Executive is the normal way; in lieu of such inquiry, or failing a sufficient answer to such an inquiry, the courts have, at various times, studied the history of a foreign country, as in *The Charkieh* (1873), L.R. 8 Q.B. 197, or made their own assumptions about recent foreign history, as in the case of the *Ionian Ships*, 1 Spinks Prize Cases 193, in *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348, and in *The Lomonosoff*, [1920] P. 97; they examined the Constitution of a foreign country (Eire) in *Murray v. Parkes*, [1942] 10 K.B. 123; and they have accepted a communication regarding the ownership of a vessel from a foreign embassy and an affidavit in support by a foreign consul, as in *The Porto Alexandre*, [1920] P. 30. But further than this they have not ventured. (In the United States, where the rules of evidence appear to permit more latitude than do the English rules, speeches in Congress, diplomatic correspondence and Presidential Messages and press releases have all been admitted by the courts there as evidence of such things as recognition of foreign Governments and so on: see the cases cited by Lyons in this *Year Book*, 24 (1947), at p. 128.) But it would appear now that the category of sources of evidence is not closed and, though unsupported by precedent, Mr. Justice Karminski, in the *Pikelnny* case, took a robust, indeed courageous, view and ranged an oral statement made in Parliament by a Minister on behalf of the Foreign Office and as reported by *Hansard*, alongside the written certificate of the Executive as conclusive evidence of the recognition of 'a fact of an international law nature', to wit, the 'absorption' of one State by another.

The second feature of the case which calls for comment is this. The 'absorption' of Lithuania into the U.S.S.R. took place in 1940. Germany invaded Lithuania in 1941 and Pikelnny died in the same year. The statement in the House of Commons was made in 1947, and was in the present tense: 'His Majesty's Government recognize that the Baltic States have *de facto* been absorbed into the Soviet Union.' On this, the Court was satisfied that the *de facto* recognition of the present Lithuanian Government had

taken place 'on about February 10, 1947, or thereabouts'; it held, in other words, that the statement in Parliament constituted, or at least was contemporary with, that recognition. Strictly speaking, that decision was not necessary for the purpose of the case then before the Court, where the question was what the law of Lithuania was in 1941, and it would have been sufficient for that purpose had the Court found that the recognition of the Lithuanian Government had taken place some time before February 1947. To that extent the finding may be considered *obiter*, but it is a finding: the Court has spoken; and the principle to be deduced from it would appear to be that unless a public statement by the Executive about the recognition of a foreign State or Government specifies the date on which that recognition took place, the Court will deem it to have taken place on or about the date on which the statement is made. In the *Boguslawski* case mentioned above, the certificate of the Secretary of State for Foreign Affairs stated that '... as from midnight of July 5/6 [1945] His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as the government of Poland. . . .' This is the first use of the expression 'as from' in certificates of this kind, and it is a very convenient expression. Mr. Justice Finnemore called it 'very commendable' ([1950] 1 K.B., at p. 172), and it was used again in the certificate of the Foreign Office given in *Civil Air Transport Incorporated v. Central Air Transport Corporation*, [1953] A.C. 70, which involved the recognition of one Government of China up to a certain date and the recognition of another Government thereafter. But in both these cases there was a formal, deliberate act of recognition; in the *Pikelný* case there was not. Indeed, it may be that the British Government had not before 1947 decided whether, and how far, to recognize that the Government of the U.S.S.R. was the Government of Lithuania. The question may not have arisen, but in February 1947 it did arise and the Government had to declare itself. Eight years later the Court decided that that declaration constituted recognition. It can be objected that all this is very academic, that recognition is retroactive and that it therefore does not matter what date the courts may ascribe to a recognition. But it is not by any means certain that recognition is always and for all purposes retroactive; indeed in this case Mr. Justice Karminski held that the recognition of 1947 did not relate back to 1941, and that therefore the law of the Lithuanian Republic and not Soviet Russian law concerning the succession to the estate of a deceased person was applicable to the property of Feivel Pikelný.

As a third point, it might with great respect be asked whether it was necessary to go to all this trouble to establish whether or not the 'absorption' of Lithuania by the U.S.S.R. had been recognized by the British Government in 1941. The question at issue was, what was the law of the domicil at the date of the death of Pikelný—was it Russian or Lithuanian law? The rule as stated in Dicey's *Conflict of Laws* (6th ed., 1949), p. 815, is: 'The law which governs the succession to a deceased's movables is the law of the deceased's domicile as it stands at the time of his death: . . . if a change is made in that law after the death . . . the succession to . . . his movables in England is not affected by the change.' This was decided in *Lynch v. Paraguay Provisional Government* (1871), L.R. 2 P. & D. 268, where by a Decree of the Government of Paraguay made after the death of one Lopez, all the property of the deceased wherever situate was declared to be the property of the nation of Paraguay; no will of the deceased was to be valid. The Court of Probate left to the Court of Chancery the question whether the Decree was 'penal in character or one which the English Courts would enforce upon his personal property'. All that was needed in the present case, therefore, was to ascertain what was the law 'as it stood' in Lithuania in October 1941. The question of recognition or otherwise by the British Government was *nil ad rem*.



In fact, no evidence was adduced as to what the law of succession to movables was in Lithuania in October 1941. All that was said was that when Lithuania 'joined the U.S.S.R. on August 3rd 1940', 'land, industries and private property were nationalized'. Whether this meant that intestate succession to the property of Lithuanians dying after that date ceased to be, does not appear. This brings us to the important question of how the Russian nationalization decrees (if such they were) would be regarded by the English Court and in particular whether they would be enforced upon property situated in England. There is a marked tendency, by no means confined to the courts of England, to construe foreign legislation of a political and confiscatory character as restrictively as possible, for example, by construing it as operating only within the territory of the sovereign (Dicey, *op. cit.*, p. 155). Summarizing the relevant principle as it would probably have been stated before 1940, Lord McNair writes (*op. cit.*, p. 367) that when an English court is invited to enforce upon property in England rights claimed under a law or decree of a foreign country purporting to have extra-territorial effect, it will *certainly* not do so if the foreign law or decree is penal or otherwise objectionable from the English legal point of view, and it will *probably* not do so even if the foreign law or decree is not penal or otherwise so objectionable. With the exception of cases concerning ships, such as *The Cristina*, [1938] A.C. 485 (of which Lord Wright said (at p. 509) that it might 'have, as being a foreign merchant ship, a different status from an ordinary chattel on land'), *The El Condado*, [1939] S.C. 413, 63 Ll. L. Rep. 83, 330, and *The Navemar*, 90 F. 2d 673, *Annual Digest and Reports of Public International Law Cases*, 1938-1940, Case No. 68, there has been no decision of the English courts which derogates from Lord McNair's rule. Judge Sir Hersch Lauterpacht goes no further than to say that States (and their courts) are under no obligation to recognize the effects of foreign legislation, whatever the place of its purported effect, which is in itself contrary to international law (Oppenheim, *op. cit.*, vol. i (8th ed., 1955), p. 268), and that the courts of many countries, including British and American courts, decline to give effect to the public law of foreign States. In particular, they refuse to enforce foreign revenue laws and penal and confiscatory legislation (*ibid.*, p. 328). In fact, the learned Editor of *Oppenheim* cites few cases of refusal by courts to enforce foreign public laws other than confiscatory or penal. One case which he cites is *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24, where the House of Lords gave effect to Czechoslovakian exchange regulations; a footnote in *Oppenheim (ubi sup.)* states that two Lords dissented on the ground that they considered the regulations to be confiscatory in nature, but a reference to their speeches shows that their dissent was of a mild and tentative character. The authorities on this question were reviewed by Upjohn J. in *Re Helbert Wagg & Co., Ltd.*, [1956] All E.R. 131, where he laid it down (at p. 138) as 'part of the law of England and of most nations that in general every civilized state must be recognized as having power to legislate in respect of movables situate within that state . . . and that such legislation must be recognized by other states . . .'. And he noted that 'the modern tendency is to deny extra-territorial validity to legislation, for example, on movables situate outside the state at the time of the legislation', citing *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 Q.B. 248. That case decided that if a decree of a foreign country purports to have extra-territorial effect and to attach property situate in this country, 'the decree will not be recognized by English law and English courts'. No distinction is made in this respect between decrees which are confiscatory in their nature and those which are not. Moreover, there is no distinction between general legislation, such as part of a civil code, and *ad hoc* decrees. Unfortunately, we do not know enough about the Soviet legislation which is said to have made the property of Feivel Pikelný the property of the State. but in

the absence of evidence that it was either contrary to international law or of a confiscatory kind, there seems no reason why an English court should not give effect to it. It certainly would have been interesting, from this point of view, to see how the Court would have treated an application by the Russian State or an assignee of that State for possession of the property in England. If by Russian law the Russian State was a true heir according to the Russian conception of the term, and seeing that, as was shown in *Maldonado's* case (*supra*), there is nothing either contrary to English public policy or repugnant to English law in permitting a foreign State to take possession of the movable property of one of its subjects in this country, then a claim of the Russian State to administration of that property ought to be allowed, and there is perhaps something to be said for the view that in the absence of such a claim the Russian State might well have been cited in *Pikelny's* case. Argument could then have been heard to the effect that, recognition or no recognition, the law in fact in force in Lithuania in October 1941 was Russian law, and that that law should govern the succession to the estate of Feivel Pikelny. In *Maldonado's* case, Evershed M.R., in the Court of Appeal, could find no rule 'which confines successions to individuals having a particular quality or characteristic [e.g., having some generally recognized nexus of personal relationship with the deceased] or which has the effect of excluding a state from entertaining the capacity' (at p. 1579).

A final point for remark is the fact that, at the end of his Judgment, as reported, Mr. Justice Karminski said that he would grant letters of administration to the attorney for 'those who would have been the next-of-kin according to English law, that being the law of the Lithuanian Republic'. It would be interesting to know what his Lordship had in mind when he said this (if he is accurately reported). He may have meant either that Lithuanian law referred the succession of movables situate abroad to the law of the country in which they were situate, or that the Lithuanian law of intestate succession to movables was the same as English law. In fact, the evidence filed supports neither view. There was no evidence of the order in which the deceased, his wife, and his two children died. According to the Lithuanian Civil Code (Sections 1110, 1111, 1121, 1124, 1127, 1136, 1138, and 1148), in the absence of proof of survivorship, the estate of none of these persons can benefit under the intestacy of any of the others; and the collateral blood relations of the deceased Pikelny, that is, his brothers and sister, are entitled. Now, the English law relating to *commorientes*—persons in immediate succession to each other who die in circumstances which render it uncertain which survived the other or others—in force in 1941 was contained in Section 184 of the Law of Property Act, 1925, which provided that deaths occurring in such circumstances must be deemed to have occurred in order of seniority, the younger person being deemed to have survived the elder. (The rule has been amended by the Administration of Estates Act, 1952, for deaths occurring after that year.) No evidence was filed as to the respective ages of Feivel Pikelny and his wife. In any event, whichever of them were the younger, if English law were to apply to the succession, the husband's estate might pass to the two children and so to their next of kin. The legal position is complicated by the rule enunciated in *Re Cohn*, [1945] Ch. 5, where two persons domiciled in Germany died in England in circumstances rendering it uncertain which was the survivor, that Section 184 of the Law of Property Act, 1925, was not applicable; it was a rule of law directing a presumption to be made where the title to property was in question. But it had no application where the title was determined by the law of another country. The law of the domicile was alone relevant in determining the distribution of the estates, and was the basis on which the property was to be administered.



Whichever view is taken of the law applicable to the case of Feivel Pikelný, the judgment is difficult to understand save as a direct and common-sense decision, with a judicial cutting of a Gordian knot or two, so as to avoid, in accordance with the rule *ut res magis valeat quam pereat*, the property in England lying unclaimed for want of an administrator.

A. B. LYONS

### CONSULAR STATUS UNDER UNRECOGNIZED RÉGIMES—WITH PARTICULAR REFERENCE TO RECENT UNITED STATES PRACTICE

GENERAL agreement obtains on the following conditions under which consular status is terminated in a receiving State: (1) notification to the receiving State of the termination of consular status by the sending State; (2) death of consul; (3) withdrawal of the exequatur by the receiving State; and (4) extinction of the sending or receiving State. Controversy exists, however, with respect to the status of a consul or consular property in territories under the *de facto* control of a Government which the sending State for political or other reasons refuses to recognize. The problem is not merely of theoretical but also of practical interest. Disagreement over it could conceivably lead to serious complications and even war between nations.<sup>1</sup> This Note is an attempt to clarify some doubtful points concerning consular status under an unrecognized régime, using incidents involving American consuls in China as illustrative of the problems under discussion.

The United States considered as infringements of American consular rights Communist China's imprisonment of Consul General Angus Ward and four members of his staff at Mukden in 1949,<sup>2</sup> and its requisition of former military barracks which housed the American consular offices at Peking in the same year.<sup>3</sup> On the former occasion, Secretary of State Dean Acheson addressed a 'personal message', dated 18 November 1949, to thirty Foreign Ministers of countries which had either diplomatic or consular representatives in China. He stated that he considered the Angus Ward incident a 'direct violation of the basic concepts of international relations which have been developed throughout the centuries'.<sup>4</sup> In the Peking Consular Premises incident, the Department of State charged the Peking Government with 'a flagrant violation of our treaty rights and of the most elementary standards of international usage and conduct'.<sup>5</sup> As a result of this case, all American diplomatic and consular officers were withdrawn from China.

<sup>1</sup> Indeed, a case can be made that the political impasse between the United States and the People's Republic of China, the extension of the Korean War, and the continued tension in the Far East, are in part attributable to such a controversy. It may be recalled that the disputes over American consular rights and status in unrecognized Communist China (e.g. the Angus Ward case and the Peking Consular Premises case) led to the withdrawal of all American diplomatic and consular officers from the mainland of China in 1950 (see U.S. Department of State *Bulletin*, vol. xxii, No. 551 (23 January 1950), p. 119). Such a complete withdrawal, the first since the establishment of Sino-American relations in the mid-nineteenth century, could not help but create distrust between the two countries. At the same time, it deprived the United States of direct sources of information in China during a most critical period in Sino-United States relations.

<sup>2</sup> Department of State *Bulletin*, vol. xxi, No. 547 (26 December 1949), pp. 955-7.

<sup>3</sup> *Ibid.*, vol. xxii, No. 551 (23 January 1950), pp. 119-23.

<sup>4</sup> *Ibid.*, vol. xxi, No. 543 (28 November 1949), pp. 799-800.

<sup>5</sup> *Ibid.*, vol. xxii, No. 551 (23 January 1950), p. 119.

Professor Herbert W. Briggs, in his article 'American Consular Rights in Communist China',<sup>1</sup> also regards these instances of mistreatment of American consular officers in China as 'in violation of international law, not merely as in contravention of comity, usage or practice'.<sup>2</sup> He concludes:<sup>3</sup>

'Customary international law clearly established the international responsibility of a succeeding government for the acts of its predecessor, as well as for its own acts, in violation of international law. Thus, whether the Mao Government succeeded to *de facto* Communist regimes in Manchuria . . . the international responsibility of the successful revolutionary government for acts in violation of international law is clear.'

The central issues involved are: (1) Did the unrecognized Chinese Communist régime have the right to refuse to recognize these American officials as consuls? (2) Did it in fact refuse to recognize them as consuls? (3) Was it required under international law to accord these individuals consular privileges and immunities for a reasonable period of time until their departure from China? (4) If the Communist régime had the right to refuse to recognize them as consuls, did it in fact refuse to recognize them as such, and was under no obligation to accord them consular privileges and immunities for a reasonable period of time until their departure from China, would the mistreatment of American officials and properties in these cases be considered a violation of American 'consular' rights?

In answering these questions, we must proceed from the fact that a receiving State has the right at all times to withdraw its consent to a person's exercise of consular functions within its territory. This principle has been affirmed by the practice of States and stipulated in many treaties. Article 8 of the Harvard Research *Draft* reads in part:<sup>4</sup>

'A state may at any time withdraw its consent to a person's exercise of consular functions within its territory. . . .'

The United States-United Kingdom Consular Convention of 1951 also reads:<sup>5</sup>

'The receiving state may revoke the exequatur or other authorization of a consular officer whose conduct has given serious cause for complaint.'

Recent instances of withdrawal of consent to foreign consuls acting as such include the Wildash incident, in which the British Vice-Consul, Mr. P. Wildash, was expelled by Czechoslovakia on charges of subversion;<sup>6</sup> the Kasenkina incident, in which the United States revoked the exequatur of the Soviet Consul General in New York, Mr. Y. I. Lomakin, for allegedly exercising extraterritorial jurisdiction and police powers over Madame Kasenkina, a Russian schoolteacher;<sup>7</sup> the Steventon incident, in which Mr. Leve Steventon, British Consul General in Mukden, was expelled in 1950 for his refusal to allow the Chinese Communist authorities to build air-raid shelters within

<sup>1</sup> In *American Journal of International Law*, 44 (April 1950), pp. 243-58.

<sup>2</sup> *Ibid.*, p. 258.

<sup>3</sup> *Ibid.*, p. 257.

<sup>4</sup> Harvard Law School, Research in International Law, II, 'Legal Position and Functions of Consuls', *American Journal of International Law*, Sup., 26 (1932), Article 8, p. 243.

<sup>5</sup> See Article 5 (3), (U.S. Congress, Senate, 82d Congress, 1st Session, Executive O). See also Italy-Latvia, 1932, Article 3 (*League of Nations Treaty Series*, vol. 150, No. 3450); Czechoslovakia-U.S.S.R., 1935 (*ibid.*, vol. 169, No. 3918); United States-Costa Rica, 1948, Article 1 (4), (Department of State, *United States Treaties and Other International Agreements*, vol. 1 (1950); *United Nations Treaty Series*, vol. 70, No. 896); United States-Ireland, 1950, Article 5 (3), (U.S. Congress, Senate, 81st Congress, 2d Session, Executive P); United Kingdom-Norway, 1951, Article 5 (3), (Norway, St. prp. No. 47 (1951)); United Kingdom-France, 1951, Article 5 (3), (Cmd. 8457); and United Kingdom-Sweden, 1952, Article 5 (3) (Cmd. 8541).

<sup>6</sup> *New York Times*, 24 March and 3 April 1949.

<sup>7</sup> Department of State *Bulletin*, vol. xix, No. 478 (24 August 1948), p. 253.



the consulate compound;<sup>1</sup> and a host of other incidents as a result of retaliatory measures.<sup>2</sup>

Since a consul at best possesses the same rights and immunities in a country controlled by an unrecognized régime as under a recognized Government, the consent to his acting as consul is therefore subject to withdrawal by the unrecognized régime as it is by a recognized Government.

Moreover, if the unrecognized Government should be deprived of the right to withdraw its consent to a consul acting as such, a situation would be created in which a Government, even deliberately not recognized, has the duties of a recognized Government, but not its rights.<sup>3</sup> For, as long as the sending State so wished, the unrecognized Government would have to accord to the officials of the sending State privileges and immunities which might not be reciprocated perhaps for an indefinite period. This would conflict with the generally accepted principle of reciprocity inherent in the consular institution.<sup>4</sup>

Referring to question No. 2, withdrawal of consent to a consul's acting as such is normally communicated through official channels to the sending State. In the case of an unrecognized régime it must be intimated in other ways, inasmuch as 'official channels' are lacking. By addressing Mr. Angus Ward and his staff as 'personnel of the former American consulate general', in marked contrast with earlier official appellations,<sup>5</sup> and by returning unacknowledged the communications concerning the Peking consular premises dated 9, 10 and 13 January 1950, sent by Mr. O. Edmund Clubb, American Consul General, to the Peking Government,<sup>6</sup> the latter left no doubt that it had withdrawn its 'consent' from the American consuls.

With respect to the third question, namely, whether upon the termination of their office consuls, like diplomats, are entitled to continued enjoyment of their privileges and immunities for a reasonable period of time until their departure from the receiving State the prevailing view is that consuls are not so 'entitled', unless otherwise provided for in treaties. The Harvard Research *Draft* states:<sup>7</sup>

'Treaties have sometimes provided that consuls be given an opportunity by the receiving state to return home after termination of their functions, particularly in case

<sup>1</sup> *New York Times*, 5 November 1950. This incident occurred after the recognition by Great Britain of the People's Republic of China.

<sup>2</sup> For example, the Soviet Union asked for the closure of the United States Consulate at Vladivostok and rescinded previously granted permission for the United States to open another consulate at Leningrad as a result of the Kasenkina-Samarin cases (see *New York Times*, 25-27 August 1948). The United States Government demanded that Hungary close its New York and Cleveland Consulates in retaliation for the treatment of Messrs. Robert A. Vogeler and I. Jacobson, despite Hungary's protest that such an action would clearly violate the consular rights pact between the two countries and interfere in Hungarian internal affairs (*ibid.*, 4 and 8 January 1950). Before the entry of the United States into the Second World War, the United States in March 1941 requested that the Italian Consulates at Newark (New Jersey) and Detroit (Michigan) be closed, apparently in retaliation for an earlier request by the Italian Government in February that the United States Consulates at Palermo and Naples be moved to as far north as Rome and away from the sea coast. Three months later, all consular relationship between the two countries was terminated. (See Hackworth, *Digest of International Law*, vol. iv (1942), pp. 680-2.)

<sup>3</sup> This refers to the fact that the unrecognized Government would have the duty to receive consuls from, but not the right to send consuls to, States which refuse to recognize it.

<sup>4</sup> See Wharton, *A Digest of the International Law of the United States*, vol. i (9th ed.), p. 768; Stuart, *American Diplomatic and Consular Practice* (2nd ed., 1952), p. 77; Hackworth, *op. cit.*, vol. iv, p. 699.

<sup>5</sup> See 'Angus Ward Summarizes Mukden Experiences', Department of State *Bulletin*, vol. xxi, No. 547 (26 December 1949), p. 955.

<sup>6</sup> Department of State *Bulletin*, vol. xxii, No. 551 (23 January 1950), pp. 120-3.

<sup>7</sup> Harvard Research *Draft*, pp. 250-1.

of breach of diplomatic relations . . . ; but it is not believed that such a privilege exists in general international law, and in view of the general subjection of consuls to local jurisdiction it seems unlikely that it would be acceptable for a general convention unless so qualified as to be valueless.'

Thus, what considerate treatment consuls may receive after the termination of their office is a matter of courtesy, custom or political policy of the receiving State.

A few post-war consular conventions have provided that in the event of war or rupture of relations between the Signatory Powers, their consuls shall be given reasonable time and proper facilities to depart from the receiving country and be afforded 'considerate treatment and protection until the moment of their departure, which shall take place within a reasonable period'.<sup>1</sup> Neither the United States nor China has been a party to any such treaties. The United States specifically objected to a British proposal for incorporating this feature into the United States-United Kingdom Consular Convention of 1951 because of its possible restraint on the United States Government against detaining consuls known to have information detrimental to the security of the United States.<sup>2</sup>

The answer to question No. 4 would naturally depend on the answers to the first three questions. If, as explained above, an unrecognized régime had the right to refuse to recognize certain individuals as consuls, in fact did refuse to recognize them as such, and was under no obligation to grant them continued enjoyment of consular privileges and immunities for a reasonable period of time until their departure from the country, no 'consuls' would be involved at all and, hence, no violation of consular rights. The mistreatment of 'former consuls', deplorable as it may be, must belong to the same category as mistreatment of any alien civilians.

Historically, the problem of consular status in the territories of an unrecognized Government has only infrequently arisen. This may be due to the eagerness of the unrecognized Government to ingratiate itself with the sending States, more in the hope of obtaining eventual recognition than to a desire for the 'proper observance' of international law. Thus, a policy of non-interference with respect to foreign consular status was adopted by many unrecognized Latin-American revolutionary régimes, as well as by the unrecognized 'Manchoukuo' Government during the Sino-Japanese conflicts in the nineteen-thirties. Foreign consuls in Manchuria and other parts of China under Japanese occupation were left on the whole undisturbed, and were not compelled to request new exequaturs from either the Japanese or the 'Manchoukuo' Government.<sup>3</sup>

However, when more urgent considerations call for drastic measures, the practice of States has been for new Governments to deny consular status to representatives of States who have not recognized them. Thus, British consuls were expelled by the Southern Confederacy during the American Civil War.<sup>4</sup> The unrecognized German (occupation) authorities in Belgium<sup>5</sup> during the First World War, and in Danzig<sup>6</sup> and

<sup>1</sup> See the First Protocol of Signature, Sec. (2), to the following Consular Conventions: the United Kingdom-Norway, 1951; United Kingdom-France, 1951; and United Kingdom-Sweden, 1952.

<sup>2</sup> For a detailed discussion on this subject see Lee, *The Development of the Consular Institution* (Ph.D. thesis, Fletcher School of Law and Diplomacy, Medford, Massachusetts), pp. 296-300.

<sup>3</sup> See Hackworth, *op. cit.*, vol. iv, p. 688.

<sup>4</sup> See Bonham, *British Consuls in the Confederacy* (1911), p. 218.

<sup>5</sup> *American Journal of International Law*, Spec. Sup., 10 (1916), pp. 448-9. The United States complied with the German demand.

<sup>6</sup> See Hackworth, *op. cit.*, vol. iv, p. 690. The Department of State decided to close the Consulate at Danzig rather than request a new exequatur from the German Government.



Poland<sup>1</sup> during the Second World War, decided to withdraw the consent to foreign consuls acting as such, unless new exequaturs were obtained from the occupation authorities. The Shanghai Military Control Committee removed the Spanish Consul, Julio de Larracochea, for 'contempt' of the Communist régime and for contravening Chinese Communist Government Decrees by 'his consular and other illegal activities'.<sup>2</sup> Besides the American consular premises, parts of French and Dutch consular properties in Peking were also seized, on the ground that these lands had been acquired under unequal treaties.<sup>3</sup>

Sometimes, the denial of consular status may be accompanied or followed by the imprisonment of the officials concerned, as in the Angus Ward incident and similar cases under the Bolshevik régime.<sup>4</sup> The consent to their acting as consuls having been withdrawn, they are therefore regarded as ordinary aliens, without consular rights and immunities.<sup>5</sup>

The following points appear to emerge from the above discussion:

(1) Inasmuch as a consul cannot claim more extensive rights and privileges under an unrecognized régime than in a recognized State, the consent to his acting as consul may be withdrawn at any time by the unrecognized régime as by a recognized Government.

(2) Should the consent to the continued functioning of a consul be withdrawn by an unrecognized régime, such withdrawal cannot be formally notified to the sending State, because non-recognition, like recognition, is reciprocal, and one of its purposes is the mutual refraining from diplomatic intercourse. Instead, the withdrawal of the consent may be indicated, for example, by the way in which the unrecognized régime addresses the consular officer, and by its returning of, or refusing to accept, official communications sent by him.

(3) When a person is no longer regarded as a consul by an unrecognized régime, his consular privileges and immunities cease immediately, unless otherwise provided in treaties. This is in contradistinction to the position of a diplomatic officer, who would continue to enjoy his diplomatic privileges and immunities for a reasonable period of time until his departure from the receiving State.

(4) A consul may continue to discharge his functions and enjoy his privileges and immunities under an unrecognized régime, not because he has a right under international law to do so, but because he is permitted to do so for policy reasons and by the goodwill of the unrecognized régime.

(5) The continued maintenance of consular officers in a country under the control

<sup>1</sup> Ibid., p. 691; see also Stowell, 'Vae Victis, Consuls in Occupied Areas', in *American Journal of International Law*, 34 (1940), pp. 310-12.

<sup>2</sup> *New York Times*, 23 July 1950.

<sup>3</sup> Ibid., 16 January 1950.

<sup>4</sup> Three United States Consuls in Russia were imprisoned by the Bolsheviks. Vice-Consuls Alfred T. Burri and Robert F. Leonard at Moscow were imprisoned for 72 days before release. No reasons were given for their detention. (U.S. *Foreign Relations*, 1918, Russia, vol. i, p. 673.) Roger C. Tredwell, American Consul at Tashkent, Turkestan, was first arrested on 15 March 1918, but released after five hours. He was arrested again on 26 October 1918, and kept in detention until 27 March 1919 (ibid., pp. 183-94). The reason given for his first arrest was an 'error'; for the second, the actions of the 'abnormal' Commandant, which 'the authorities were powerless to check' (ibid.).

Not only United States consuls were affected, but also the British, French, and Italian, as revealed by the report from the United States Chargé d'Affaires in Sweden. Mr. Whitehouse, to the Secretary of State, of 14 September 1918 (ibid.).

<sup>5</sup> This should not be interpreted as condoning any unjustifiable mistreatment of 'ex-consuls'. Rather does it mean that, being 'ex-consuls', they no longer enjoy consular privileges and immunities. Their status as aliens alone should entitle them to a certain minimum standard of protection under customary international law.

of an unrecognized Government is fundamentally incompatible with the purposes of non-recognition in the long run. The former presupposes a desire for international relationship; the latter, the denial of this desire. The prolongation of this anomaly could easily lead to conflicts over the proper treatment of 'former consuls'.

The question of consular status under an unrecognized régime may be approached also from the larger issue of general treaty rights in a country under the control of a Government not recognized by the sending State, if the consular relations have been based on past treaties. Since the larger issue is itself unsettled, this approach has not been dealt with. It is hoped, however, that this paper may contribute in some small manner towards the clarification, by means of the inductive method, of the issue of general treaty rights in a country under an unrecognized administration.

LUKE T. LEE<sup>1</sup>

### THE TREATY POWER IN INDIA

THE question of the proper scope of the treaty power has long been considered one of the most difficult constitutional problems in a federal system. There is already a large literature on the subject as it relates to the four 'classic' federations—the United States of America, Switzerland, Canada, and Australia. The experience of India, although it has not so far received much attention, is of great interest for two reasons. First, India is the largest federation in the world in terms of population and this, combined with its present crucial position in international affairs, makes study of its treaty power important. Secondly, since India is the most recent of the world's main federations and has evolved through two constitutions, a study of the Indian experience is a case study in nascent federalism. India is unique among existing federations in exhibiting the evolution of the treaty power from the restrictive Canadian model to the fuller American-Australian model. We shall consider this evolution under the two successive constitutions of India as it relates to both aspects of the treaty power, treaty making and treaty enforcement.

#### *The Government of India Act, 1935*

(a) *The treaty-making power.*—The Government of India Act, 1935, provided for the establishment of a Federation of India under the Crown, composed of the British India Provinces and those of the Indian States who would accede to the Federation.<sup>2</sup> The executive authority of the Federation was to be exercised by the Governor-General on behalf of the Crown<sup>3</sup> and was to extend, *inter alia*, to the matters with respect to which the Federal Legislature had power to make laws.<sup>4</sup> The Governor-General could also exercise 'such other powers of His Majesty, not being powers connected with the exercise of the functions of the Crown in its relations with the Indian States, as His Majesty may be pleased to assign to him'.<sup>5</sup> Naturally, such other powers of the Crown comprised the conclusion of treaties, a royal prerogative.<sup>6</sup> It was, therefore, perfectly possible for the Governor-General to enter into agreements with foreign countries or to ratify treaties under full powers granted by the Crown, operating of course under the complete control, in all matters of procedure, of the Foreign Office and India Office.<sup>7</sup>

<sup>1</sup> Assistant Professor of Political Science, Pennsylvania State University.

<sup>2</sup> Section 5 (1).

<sup>3</sup> Section 7 (1).

<sup>4</sup> Section 8 (1) (a).

<sup>5</sup> Section 3 (1) (b).

<sup>6</sup> See Keith, *A Constitutional History of India* (1937), pp. 408–9.

<sup>7</sup> *Ibid.*, p. 410.



The sphere of the Federal Legislature was laid down by Section 100 (1) of the Act of 1935 in these terms:

‘Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a *Provincial Legislature has not* power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the Federal List).’

Item No. 3 of the Federal List reads as follows:

‘External affairs; the implementing of treaties and agreements with other countries; extradition, including surrender of criminals and accused persons to parts of His Majesty’s dominions.’

It was thus obvious that a Province or a Federated State had no right, not even a limited one as in the United States or Switzerland, to enter into agreements with any foreign country or to share with the Federal Government in the conduct of external affairs. By virtue of the paramountcy of the Crown over the Indian States, these States had lost all powers to establish any relation with foreign States. While the Governor-General was invested with the exclusive power to determine the external relations of the Federation, the Crown Representative in India had to deal with the Crown’s relations with the Indian States in so far as such relations did not fall within the executive authority of the Federation.<sup>1</sup> Thus, even although the Act provided that ‘It shall be lawful for His Majesty to appoint one person to fill both the said offices’,<sup>2</sup> yet it is clear that the Act did not establish one single authority in India to conduct the foreign relations of ‘India’ as a whole, except perhaps India’s relation with the League of Nations and the I.L.O., whereas such an authority did exist in Great Britain in the Crown acting on the advice of the British Cabinet. It was for this reason that the Foreign and Political Department of the Government of India was split up on 1 April 1937 into two separate Departments, viz. the Political Department under the control of the Crown Representative, and the External Affairs Department under the charge of the Governor-General of the Indian Federation.<sup>3</sup>

The authority of the Governor-General over a Federated State extended only to the matters ‘which the Ruler accepts as matters with respect to which the Federal Legislature may make laws for his State’. Moreover, it was subject to such limitations on the power of the Federal Legislature to make laws for his State and on the exercise of the executive authority of the Federation in his State, as were to be specified in the Instrument of Accession.<sup>4</sup> On the other hand, subsection 2 of the same Section laid down that not only the Governor-General but also His Majesty the King were to exercise in relation to a Federated State ‘such functions as may be vested in them by or under this Act’, but ‘subject always to the terms’ of Accession, and ‘for the purposes only of the Federation’. It is, in consequence, extremely difficult to determine the exact relation between the Crown and a Federated State in some spheres under the Act of 1935.

The Governor-General who was to exercise the executive authority of the Federation on behalf of His Majesty was required by Section 11 to act in his *discretion* while discharging his functions with respect to external affairs, ‘except the relations between the Federation and any part of His Majesty’s dominions’. And Section 14 laid down that ‘In so far as the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of and comply with such directions, if any, as may from time to time be given to him by the Secretary of State.’ The relation between the Federation and any part of His

<sup>1</sup> Section 3 (2).

<sup>2</sup> Section 3 (3).

<sup>3</sup> See Rudra, *Viceroy and Governor-General of India* (1940), p. 71.

<sup>4</sup> Section 6 (2).

Majesty's dominions was, however, placed within the sphere of internal affairs.<sup>1</sup> The distinction between external and internal affairs was unclear. The Fiscal Convention of 1921 was, for example, not embodied in the Act, because of the difficulties of distinguishing commercial and economic relations from external relations, as pointed out by the Federal Structure Committee, although the latter expressed the view that commercial relations would fall primarily within the purview of the Legislature and of Ministers responsible thereto.<sup>2</sup> The Joint Committee on Indian Constitutional Reform, following the practice in England, where all commercial agreements with foreign countries are made through the Foreign Office in co-operation with the Board of Trade, expressed the view that an 'agreement of any kind with a foreign country must be made by the Governor-General, even if on the merits of a trade or commercial issue he is guided by the advice of the appropriate Minister'.<sup>3</sup>

On the whole, the Indian Federation under the Government of India Act, 1935, was not to have an independent foreign policy of its own. Admittedly, India signed the Treaty of Versailles, 1919, and became an original Member of the League of Nations. But the Indian delegation both in the League and in the I.L.O. had ultimately to act in accordance with the instructions of the Secretary of State, particularly in matters of foreign and imperial affairs.<sup>4</sup> What is more significant, the League or the I.L.O. Conventions signed or acceded to by 'India' did not automatically extend to or become binding upon the Indian States, although, as the Indian Statutory Commission observed: 'It is India and not British India which is a member of the League and "India" as defined in the Interpretation Act includes the Indian States.'<sup>5</sup>

The consequence was that when 'India' adopted a League Convention, an article enabling the contracting party (the Crown) to exclude territories under its suzerainty was included in the Convention. As regards draft Conventions adopted at International Labour Conferences, the Statutory Commission said: 'It was decided in 1927, after discussion with the Government in India, to explain the practical difficulties to the Secretary-General of the League and to inform him that when a draft convention is ratified for India, its obligations are accepted as applying *only to British India*, though the Government of India would, so far as necessary, use their influence to secure its observance in the States also.'<sup>6</sup>

(b) *The treaty-enforcement power*.—The attitude of the British Government in allowing the Indian States the freedom either to adopt or reject the League and I.L.O. Conventions signed by 'India', although the British Crown had an undoubted paramountcy over them, led to the incorporation of Section 106 in the Government of India Act, 1935. The purpose of this section was to establish equality of status between the British Indian Provinces and the Federating States. Section 106 (1) declared:

'The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries, have power to make any law for any Province except with the previous consent of the Governor or for a Federated State, except with the previous consent of the Ruler thereof.'

The Federal Legislature was thus prohibited from legislating for the implementation of a treaty or agreement entered into by the Federal Government with any foreign

<sup>1</sup> For reasons, see Keith, *op. cit.*, p. 407.

<sup>2</sup> Indian Round Table Conference (second session) (1931), Proceedings of Federal Structure Committee, p. 486.

<sup>3</sup> *Report*, 1934, para. 184, p. 102.

<sup>4</sup> See Manning, 'India and the League of Nations', in *India Analysed* (1933), pp. 34-38. Also Coyajee, *India and the League of Nations* (1932), pp. 23-27.

<sup>5</sup> *Report*, vol. v, p. 1636.

<sup>6</sup> Indian Statutory Commission, vol. v, pp. 1649-50.



Power without the previous consent of the Governor of a Province or the Ruler of a Federated State, when such legislation encroached upon the Provincial List. This is exactly the situation in the Canadian Federation after the decision of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario*.<sup>1</sup> This is also precisely the situation envisaged by the 'which clause' (Section 2) of the Bricker Amendment in the United States.<sup>2</sup> Indeed, India is the only federal State which has ever had a Bricker Amendment type provision in its organic constitution, and many of the Bricker Amendment arguments were put forward when this first constitution was adopted.

The defects of the principle on which Section 106 (1) of the Act of 1935 was based were clearly pointed out by Dr. C. W. Jenks two years before the Act was passed.<sup>3</sup> Labelling this principle as 'regressive in respect of British India', he argued:

'The Federal Government will no longer have its present general power to give effect to international engagements in British India, and the exclusively provincial list includes subjects of international importance, notably those referred to in the discussion above of earlier proposals, and health insurance and invalid and old age pensions, which now appear in the provincial list, although they are a leading pre-occupation of the International Labour Organisation and some aspects of them, particularly the insurance rights of migrants, cannot be adequately dealt with except on an international basis. The position would be particularly serious if this requirement of concurrence by the units in the acceptance of international obligations upon non-federal subjects were construed as requiring the concurrence of the Provinces in the acceptance of obligations upon subjects in List III (Concurrent List). This List includes a number of subjects of considerable international importance.'<sup>4</sup>

The difficulties mentioned by Dr. Jenks were partially met by enlarging the scope of List I; by limiting the requirement of previous consent of the units in relation to international obligations, not to 'non-federal subjects', as mentioned in the White Paper Proposals (List I, item 8), but to 'provincial subjects'; and by the addition of subsection (3) to section 106. In this way the requirement of provincial assent with regard to international obligations affecting subjects of concurrent jurisdiction was avoided. But there still remained a hard core of subjects on the exclusively provincial list which could not be touched by federal treaty-implementing legislation. Full powers to implement international obligations were never given to the Federal Legislature under the Government of India Act, 1935.

### *The Indian Constitution of 1950*

It was probably the Canadian Constitution which was in the mind of the British Parliament when it passed the Government of India Act, 1935. Although the latter contained a list of matters of concurrent jurisdiction which was conspicuously absent from the Canadian model, yet in the sphere of treaty implementation the Government of India Act failed to rise above the difficulties of the Canadian Constitution. It was because of this failure that in framing the Indian Constitution of 1950 the American-Australian model was followed with respect to treaty powers.

On 1 April 1937 the Provincial part of the Act of 1935 came into operation, but not

<sup>1</sup> [1937] A.C. 326.

<sup>2</sup> 'Section 2. A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty.*' (Emphasis supplied.) The Amendment has thus far failed of adoption.

<sup>3</sup> See Jenks, 'International Aspects of the Indian Constitution', Chapter V, in *India Analysed* (1933), pp. 136-9.

<sup>4</sup> *Ibid.*, pp. 189-90.

the Federal part, as the required number of States did not execute Instruments of Accession. In September 1939 the Chamberlain Government declared India a belligerent without the consent of the Indian Legislature, and on 7 October 1939 the Governor-General announced that the Federation would not be inaugurated during the war. After the conclusion of the Second World War, the new Labour Government of Great Britain proceeded with constitutional talks, and on 18 July 1947 the Indian Independence Act (operative from 15 August) gave India complete independence both in her internal and external affairs. The Governor-General became, like his counterparts in Canada and Australia, a constitutional head representing the Crown for the purposes of the Government of the Dominion, and ceased to act in his 'discretion' in relation to external affairs or any other matter. The suzerainty of the Crown over the Indian States also lapsed and with it all treaties and agreements between it and the rulers of the Indian States.<sup>1</sup> But Pandit Nehru, with the concurrence of other Indian leaders, emphasized the factual basis of paramountcy and warned foreign Powers that any attempt on their part to recognize the Indian States or enter into any relation with them would be an 'unfriendly act' to India. Until the promulgation of the new Constitution of India, the Act of 1935, amended by several Provisional Constitution Amendment Orders, continued to be the basis of the administration of the Dominion of India. Between 15 August 1947 and 25 January 1950, hundreds of Indian States became part of the Dominion of India through integration and merger based on Instruments of Accession. On 20 January 1950 the new Constitution of India was promulgated. India is now a republic with a parliamentary cabinet system of government. The Constitution of India is federal with three Lists: Union, State, and Concurrent. In addition, all residuary subjects have been vested in the Union Parliament. The component units have been divided into three categories of States: Part A, Part B, and Part C. The new Constitution marks a complete break with the past in the matter of treaty-making and treaty-implementation.

(a) *The treaty-making power.*—The Constitution of 1950 draws a distinction between treaty-making and treaty-implementing power and, in accordance with the practice of the British Constitution, which to a great extent serves as the model of India's parliamentary cabinet system, vests the entire treaty-making power in the executive. The words 'entering into treaties and agreements with foreign countries' occur in entry No. 14 of the Union List, over which, by virtue of Article 246, Parliament has 'exclusive power to make laws'. But this does not mean that Parliament can *enter into* treaties. Further, there is no article in the Indian Constitution corresponding to Article II, Section 2 (2) of the United States Constitution which requires the President to make treaties by and with the advice and consent of the Senate. Within the British Commonwealth, treaty-making is regarded as a purely executive prerogative, and the same rule obtains under the new Indian Constitution.

Article 53 (1) says: 'The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.' Article 73 provides: '(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.'

Section (1) (b) of Article 73 does not vest treaty-making power in the executive; it merely authorizes the Union executive to exercise rights arising out of a treaty. 'The

<sup>1</sup> Section 7 (b) of the Act.



treaty-making authority of the executive is given in Section (1) (a) of this Article read in conjunction with item No. 14 of the Union List.<sup>1</sup>

The power of the Parliament to legislate with regard to 'entering into treaties' should not be read as implying that a treaty made by the executive will be invalid in international law if it is not approved by an act or resolution of the Parliament. It would seem that such a treaty will be perfectly valid in international law even if it is made against a resolution of the Parliament. The Parliament can at most pass a vote of no-confidence against the Cabinet for making a treaty in contravention of its resolutions. The political power of the Parliament rests upon the principle of cabinet responsibility. The constitutional power of the Parliament with regard to 'entering into treaties', therefore, means nothing more than the power to make laws sanctioning money expenditure and the power of altering existing laws for the implementation of treaty obligations of the Union.

(b) *The treaty-enforcement power.*—As distinguished from treaty-making power, the treaty-implementing power of the Union Parliament is full and real. A treaty does not become 'law of the land' automatically in India. There are no self-executing treaties. In India, as in the United Kingdom or any Dominion, legislative action is necessary for the performance of treaty obligations, if they entail an alteration of the existing law.<sup>2</sup> And Parliament may constitutionally refuse to pass the necessary implementing legislation, thus placing the Union in default.<sup>3</sup>

On the other hand, if Parliament so likes, it can implement treaty obligations by enactments trenching upon matters enumerated in the State List. Article 246 (1), read in conjunction with entries 13 and 14 in the Union List, does not by itself establish this power beyond all doubts. For, although Parliament alone has the power to implement treaties and other agreements, yet if the subject-matter of the treaty-implementing legislation is covered by an entry in the State List, the validity of the legislation may well be disputed in the courts on the basis of Article 246 (3). To avoid such possible disputes, Article 253 expressly lays down that 'Notwithstanding anything in the foregoing provisions of this Chapter [XI], Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.'

This constitutional provision secures for India a broader treaty power than that existing in any other federation. In Canada, a treaty (unless it is an 'Empire' treaty) cannot authorize the Dominion Parliament to legislate on a provincial subject. The Parliament of Australia and the Congress of the United States have greater powers; but any federal legislation going beyond the treaty obligation is invalid if it trenches upon subjects normally within the jurisdiction of the States. Moreover, such legislation to be valid must not contravene any prohibitions of the Constitution. In India, on the other hand, Parliament has power to make laws for implementing not only

<sup>1</sup> See Basu, *Commentary on the Constitution of India* (2nd ed., 1952), p. 279.

<sup>2</sup> Two recent cases illustrate this proposition: *Birma v. The State* (1951), A.I.R. (38) Raj. 127; *Nanka v. Governor of Rajasthan* (1951), A.I.R. (38) Raj. 153. The former Dholpur State of which the petitioner was a citizen had, before the independence of India, concluded an Extradition Treaty with the British Government. The Treaty was not incorporated into the law of the State by legislative enactment. In these two cases the High Court of Rajasthan found it impossible to apply the Treaty since it was not incorporated into municipal law.

<sup>3</sup> Article 51 (c) of the Constitution provides that the State shall endeavour to 'foster respect for international law and treaty obligations in the dealings of organized peoples with one another'. But this is simply one of the directive principles of State policy in Chapter 4 of the Constitution which are non-justiciable and cannot be enforced by the courts. See Basu, *op. cit.*, pp. 230-1.

international obligations of the Union arising out of treaties, agreements, and conventions, but also *decisions* of any international conference, association, or other body, although such decisions are not legally binding upon India.<sup>1</sup> And such implementing legislation is not limited to subjects normally within federal legislative competence. Thus the 'treaty power' in India appears to be virtually unlimited either as to subject-matter or as to the need for an international obligation upon which to ground the implementing legislation.<sup>2</sup> Probably the only limitation is that legislation for giving effect to international agreements or decisions cannot violate the Fundamental Rights<sup>3</sup> guaranteed in Part III of the Constitution.

The potentialities of this broad power are apparent. Under the new Constitution, India has entered into nearly fifty agreements with foreign Powers on diverse matters of interest, many of which impinge on provincial subjects. Apart from these treaties, agreements and conventions, India has participated every year in more than a dozen international conferences. Besides this, she is a member of F.A.O., U.N.E.S.C.O., I.L.O., W.H.O., I.T.U., U.P.U., W.M.O., and other specialized agencies of the United Nations, and hence committed to promote their objectives by individual and collective efforts. Some of these have far-reaching ramifications. For example, the General Conference of the International Labour Organization proposed in 1950, for future international action, the regulation of the conditions of employment of agricultural workers in the under-developed countries.

In the light of the vast range of subjects covered by the conventions, treaties, agreements and *recommendations* of various specialized agencies and international conferences, of almost all of which India is a member, it is easy to predict that there will be an inevitable and irresistible invasion of the State List by the Parliament under Article 253 of the Constitution.<sup>4</sup> On many of these subjects there is already a large number of enactments by the Indian Legislature. Such central control will surely expand.

The trend in all modern federations is unmistakably towards centralization. External danger and internal planning are both forcing the transformation of genuinely federal constitutions into quasi-federal ones. Formal amendments of the constitution as in Switzerland, but more frequently judicial review as in the United States and Australia, have facilitated this process of transformation. Recently, a new way has been discovered in the treaty-making and treaty-implementing power of federal Governments, which

<sup>1</sup> For the view that decisions of international conferences, associations and other bodies are not legal obligations, see Oppenheim, *International Law*, vol. i (8th ed., by Lauterpacht, 1955), § 518 b.

<sup>2</sup> The only suggestion of this view in any of the other federations, that there need not be a subsisting treaty obligation upon which to ground valid implementing legislation, is in the dictum of Evatt and McTiernan JJ. in Australia. Thus they assert in the *Air Navigation* case that the external affairs power extends beyond the implementation of I.L.O. *conventions* to include the implementation of I.L.O. *recommendations*. For 'it is not to be assumed that the legislative power over "external affairs" is limited to the execution of treaties and conventions; and . . . the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.' (*The King v. Burgess; Ex parte Henry*, [1936] 55 C.L.R. 608, at p. 687.) There is no reason to believe that this accurately states the constitutional position of Australia, however.

<sup>3</sup> See Article 13 (2).

<sup>4</sup> The entries in the State List most susceptible of such invasion are: No. 4 (prisons and Borstal institutions); No. 6 (intoxicating liquors); No. 10 (education); No. 13 (communications); No. 14 (agriculture); No. 19 (forests); No. 20 (protection of wild animals and birds); No. 21 (fisheries); No. 24 (industries); No. 25 (production, supply and distribution of goods).



is being widely utilized in all federations except the Canadian for securing necessary uniformity in many matters of general interest. In this process of bringing the federal polity very near to the unitary State, India offers the greatest potentialities because of its unique constitutional provisions. The treaty power alone would justify Professor Wheare's description of the Indian Constitution as 'only quasi-federal'.<sup>1</sup>

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<sup>1</sup> See Wheare, *Federal Government* (3rd ed., 1953), p. 28.

# DECISIONS OF ENGLISH COURTS DURING 1955 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW

### *British nationality—Lineal descendant of the Electress Sophia*

Case No. 1. *H.R.H. Prince Ernest Augustus of Hanover v. Attorney-General*, [1955] Ch. 440; [1955] 1 All E.R. 746. It has been said by a high authority that 'nationality is not, in principle, regulated by international law'.<sup>1</sup> At the same time the nationality legislation of any country is bound to have international implications, some of which may raise issues of international law. This was recognized in theory in the somewhat ambiguous language of Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which reads as follows: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' And it recently fell to the International Court of Justice to determine the international effect, *vis-à-vis* Guatemala, of the legislation of Liechtenstein relating to nationality.<sup>2</sup> So much for the justification for treating in this section a case which, though of considerable historical interest, is otherwise purely one of English law.

The plaintiff, a descendant of the Electress Sophia, asked the Court to declare that he was a British subject under the combined effect of two Acts of Parliament. The first was an Act passed in 1705 and entitled 'An Act for the naturalisation of the most Excellent Princess Sophia Electress and Duchess Dowager of Hanover and the issue of her body'. The words relied upon read as follows: 'The said Princess . . . and the issue of her body and all persons lineally descending from her born or hereafter to be born be and shall be to all intents and purposes whatsoever deemed taken and esteemed natural born subjects of this kingdom as if the said princess and the issue of her body and all persons lineally descending from her born or hereafter to be born had been born within this realm of England any law statute matter or thing whatsoever to the contrary notwithstanding.' The other enactment relied upon was section 12 of the British Nationality Act, 1948, which provides that a person who was a British subject before 1 January 1949 should on that day become a citizen of the United Kingdom and Colonies, subject to certain exceptions not here relevant. (Section 34 (3) of this Act, however, repealed the Act of 1705.) The defendant in the action was the Attorney-General who, while disclaiming any hostility to the plaintiff, put him to the proof of his contention and assisted the Court by advancing or suggesting certain arguments against it.

It was *held* by Vaisey J. that the plaintiff was not entitled to the declaration. The learned Judge showed throughout every consideration to the plaintiff, and even some sympathy with his claim, which was not entirely unprecedented. It appears, for instance, that in 1784 the Marquis de Lafayette and his heirs male were made citizens of the State of Maryland, with the result that they became nationals of the United States itself when the Constitution of the United States came into force. However, few international lawyers will disagree with the learned Judge when he said that 'the examples of dual nationality, which undoubtedly do exist, give rise to so many anomalies and sources of confusion that their number ought not to be extended further than is necessary'.<sup>3</sup>

As Vaisey J. pointed out, if the plaintiff's claim were to succeed, the result would be that upwards of four hundred persons, including members of the royal families of many

<sup>1</sup> By the Permanent Court of International Justice in the case of the *Nationality Decrees Issued in Tunis and Morocco* (Series B, No. 4, p. 24).

<sup>2</sup> *Nottebohm case* (I.C.J. Reports, 1955, p. 4).

<sup>3</sup> At p. 452.



countries, would find themselves regarded under English law as British subjects, and therefore as owing allegiance to the Crown. The case was, however, a difficult one because, on the one hand, there were 'the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne', and, on the other hand, 'the consequences of a literal interpretation and application of those terms are such as to give rise to some serious misgivings as to whether it would be proper so to treat them'. This led the learned Judge to consider whether the Act of 1705 was still in force. It was plain, he said, that 'a statute is not impliedly repealed merely by becoming obsolete or by mere non-user'. However, no less an authority than Sir James Stephen had once said of an Act that it 'exists only because it is forgotten'. In the circumstances, Vaisey J. felt entitled to hold that 'as usage is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect'.<sup>1</sup> It was significant, he thought, that in the wars of 1914-18 and 1939-45 nothing had been done to denationalize various descendants of the Electress Sophia who were 'engaged in hostile operations against this country'. Presumably they were not then thought of as being British subjects.

Normally, in English law, a preamble cannot be used to control an enactment expressed in clear and unambiguous terms.<sup>2</sup> But there are exceptions to this rule. Thus, in *Ryall v. Rolle*,<sup>3</sup> Sir Thomas Parker, C.B., said: '... if the not restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it'. Vaisey J. thought there was no doubt of the 'inconvenience', and also that there was even a vague indication of an intention in the preamble to restrain it. The preamble contains the following words: '... to the end the said Princess Sophia Electress and Duchess Dowager of Hanover and the issue of her body and all persons lineally descending from her may be encouraged to become acquainted with the laws and constitutions of this realm it is just and highly reasonable that they in your Majesty's lifetime (whom God long preserve) should be naturalised and be deemed taken and esteemed natural born subjects of England.' Vaisey J.'s comments are best left in his own words.

'That leads me', he said, '... to the supposition that the main object of the Act was to make sure that whichever of the foreign born and alien-tongued persons who would be proclaimed, crowned and enthroned as the Queen's immediate or next proximate successors, should have already become subjects of England. No doubt the enacting portion of the statute might operate according to its literal expressions to the remotest point of time, but that it had any such far-reaching purpose is very difficult to believe. To suppose that Parliament thought that every descendant, however remote in time or distant in kinship of the Electress, ought to study English law is really rather absurd, however salutary the topic would have been to the immediate successors of Queen Anne. Even in its primary purpose the Act of Anne achieved a very poor measure of success, for it is notorious that King George I never learnt to speak the English language, and is not, I believe, thought to have possessed much knowledge of English law.'<sup>4</sup>

Despite the failure of the plaintiff's action, certain interesting details of his status emerged, and were confirmed by Vaisey J. Although, under the Titles Deprivation Act, 1917, and an Order in Council dated 28 March 1919, the plaintiff's father was deprived of his right to succeed the plaintiff's grandfather as Duke of Cumberland and Earl of Armagh, the plaintiff's title of 'Prince of Great Britain and Ireland', and his right to be designated as 'Royal Highness' were not affected. Moreover, under section 2 of the Act of 1917, he has the right to petition for his restoration to the roll of the British peerage, the Cumberland peerages being not extinct but merely suspended—a novel condition in peerage law. Finally, he remains, although very remotely, in the order of succession to the Crown under the Act of Settlement.

The plaintiff appealed to the Court of Appeal (Sir Raymond Evershed M.R., Birkett

<sup>1</sup> At p. 446.

<sup>2</sup> *Powell v. Kempton Park Racecourse Co. Ltd.*, [1899] A.C. 143.

<sup>3</sup> (1749) 1 Atk. 165. See also *Brett v. Brett* (1826), 3 Add. 210.

<sup>4</sup> At p. 449.

and Romer L. J.J.) who *held* that the appeal should be allowed.<sup>1</sup> Sir Raymond Evershed agreed with Vaisey J. that the words of the Act of 1705 were clear and unambiguous, but thought that the inconvenience to which the learned Judge had referred arose rather from the effect of the passage of time than from the effect of the Act itself when it came into operation. It was always open to Parliament to repeal the Act, as it did in 1948. There was no justification, he thought, for restricting 'plain and unambiguous language in a statute, years after its passing, on account of inconvenience or incongruity discovered *ex post facto*'.<sup>2</sup> The Master of the Rolls also pointed out that the notion of conferring citizenship on a particular individual and his descendants in all degrees was not so absurd as to have found no parallel in other countries. Birkett L.J. said that, although curious situations might arise when applying a statute of such age to a state of affairs in 1955, 'nothing has arisen to cast doubt on the intention of Parliament in 1705'. Romer L.J. also could see nothing absurd in the conception that Parliament was intending to provide in 1705 that all those on whom the British Crown might subsequently devolve should become British citizens at birth and considered that it was 'no more permissible . . . in construing a statute than it is in construing a deed, a will or any other written instrument, to arrive at a conclusion as to the meaning of the language used in the light of events which happened afterwards' (at p. 215).

As leave to appeal to the House of Lords was granted, it would be improper to comment on this most interesting case. It is, however, perhaps pertinent to point out that, quite apart from the nationality aspect of this case, the attitude of the English courts to the interpretation of statutes cannot fail to influence in some way the approach of English lawyers to the problem of interpretation as a whole, including the problem of interpretation of treaties.

*British nationality—Naturalization—Effect of Burma Independence Act, 1947*

Case No. 2. *Bulmer v. Attorney-General*, [1955] Ch. 558; [1955] 2 All E.R. 718. The plaintiff's name was originally Buhmeyer, but he changed it to Bulmer by a deed-poll in 1945. He claimed a declaration that, on the true construction of the Burma Independence Act, 1947, he did not cease to be a British subject by reason of the provisions of that Act. The plaintiff's father, Mr. Christian Gottfried Buhmeyer, was German by origin but was granted a certificate of naturalization in Rangoon in 1878. This certificate was granted under the provisions of 'An Act for the naturalization of aliens' passed by the Governor-General of India in Council on 16 July 1852. This Act recited that it was expedient to provide for the naturalization of aliens resident in the territories under the government of the East India Company. At the time these territories included Burma. The plaintiff was born in Rangoon in 1883 and it was not disputed that from the date of his birth until 4 January 1948 he was a British subject. When, however, he applied for the renewal of his British passport in 1951, he was informed that it could not be renewed since he had ceased to be a British subject. The ground of the refusal was that the First Schedule of the Burma Independence Act, 1947, provided, in its first paragraph, that 'persons who were born in Burma or whose father or paternal grandfather was born in Burma' ceased on 4 January 1948 to be British subjects except on certain conditions. One of these conditions was if the person concerned 'or his father or his paternal grandfather became a British subject by naturalisation. . .'. It was contended, however, by the Attorney-General that the type of naturalization granted to the plaintiff's father in 1878 was not the type of naturalization required by the Act of 1947. It was suggested that the former was a purely 'local' naturalization, whereas the Act of 1947 required a 'naturalization unlimited as to locality' or an 'imperial' naturalization.

It was *held* by Vaisey J. that the plaintiff did not cease to be a British subject under the Burma Independence Act, 1947, and that his application for renewal of his British passport ought to have been granted. There was no reason to hold that the only kind of naturalization contemplated by the words of the schedule was the so-called 'imperial'

<sup>1</sup> [1956] Ch. 188; [1955] 3 All E.R. 647.

<sup>2</sup> At p. 210.



naturalization. 'I should have thought', said the learned Judge, 'that, in an Act concerning Burma, naturalization in and quoad Burma was just the kind of naturalization most likely to have been in the contemplation of the legislature.'

The thesis that the naturalization granted under the Act of 1852 was only a 'local' naturalization seems to have derived partly from the fact that persons naturalized under that Act swore to be true and faithful to the East India Company. But they swore as well to be faithful and to bear allegiance to the Sovereign of the United Kingdom. The Attorney-General also referred to *Markwald v. Attorney-General*,<sup>1</sup> where it was held that a German who had been granted a certificate of naturalization under an Australian Naturalization Act of 1903, remained an alien when in the United Kingdom. This case, however, was found by Vaisey J. to have decided nothing more than that an alien locally naturalized remained an alien outside the locality concerned. Admittedly, Mr. Bulmer's father remained an alien for all purposes in all places other than those within the jurisdiction of the East India Company. But within those limits he was a British subject by naturalization, and it was those limits which Parliament must be presumed to have contemplated in 1947.

*Trading with the enemy—Company registered in England acquiring enemy character*

Case No. 3. *Kuenigl v. Donnersmarck and Another*, [1955] 1 Q.B. 515; [1955] 1 All E.R. 46. The plaintiff, Count Philip Kuenigl, an Austrian national resident in Hungary, married the granddaughter of Count Arthur Henckel, the head of the Austrian von Donnersmarck family. Upon Count Arthur's death, his son, the first defendant, became the universal heir of his estate. Count Arthur's two daughters, one of whom was the plaintiff's mother-in-law, became beneficiaries under Count Arthur's will and also claimed to be entitled as against the universal heir to claim their legitimate shares in the estate as inheritors. Included in the estate were valuable mines at Beuthen in Upper Silesia. Because of the political situation there, the von Donnersmarck family caused the defendant Company, the Henckel von Donnersmarck Beuthen Estates, Ltd., to be incorporated in England, to which the mines in Upper Silesia were transferred. In 1923 the plaintiff acquired by assignment certain claims against the first defendant. There then began a series of arrangements, compromises, and proceedings between the plaintiff and the two defendants. For example, in 1929 it was agreed that the first defendant should pay to the plaintiff certain moneys by instalments and that the defendant Company should guarantee this obligation. In agreements of 1939 and 1940, however, this arrangement was modified, it being provided instead that the Company become the principal debtor and the first defendant be discharged. It was also provided in these agreements that outstanding questions between the parties would be resolved in the German courts, and that certain moneys would be paid to the plaintiff's creditors in Germany. The plaintiff brought an action in the English courts in 1953, claiming against the first defendant as principal debtor, or, alternatively, against the defendant Company as guarantors, the principal and interest due under the 1929 agreement, on the footing that the agreements of 1939 and 1940 were void on account of the English law relating to trading with the enemy. The Master ordered the trial of a number of preliminary points.

It was argued by the defendants that the defendant Company, even though it was registered in England, was to be treated as a person in Germany and not in England. Consequently, it was said, no intercourse, benefit or communication took place or was required to take place across the line of war such as would render the 1939 and 1940 agreements void on account of the English law against trading with the enemy. It was also argued that, even if the defendant Company was to be treated as a person resident in England, then, on the true construction of the 1939 agreement, (i) there were no terms which necessitated intercourse with, benefit to, or communication with, persons in Germany; and (ii) if there were any such terms, the terms in question were not essential to the validity of the agreement and could be severed, leaving the remainder unaffected.

<sup>1</sup> [1920] 1 Ch. 348.

It was *held* by McNair J. that 'the defendant company was, in the eyes of English law a company having enemy character on the principles laid down in *Daimler Co., Ltd., v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*'<sup>1</sup> But this did not mean—as the defendants contended—that the Company was to be treated as being in Germany rather than in England. 'Enemy control', he said, 'may operate to the prejudice of an English company by conferring upon it enemy character, but cannot confer benefit upon it exonerating it from the operation of English law.' The Company thus having acquired enemy character on the outbreak of war, the authority of its directors and other agents had automatically determined, with the result that the 1940 agreement was not to be taken as the agreement of the Company. The 1939 agreement, which was executory on the outbreak of war, was abrogated by that event because it involved 'both benefit to the enemy and detriment to the resources of the King's subjects, as well as intercourse and means of communication' with the enemy. There was no authority for the proposition that, in a case such as this, severance of contractual terms was permitted and there was certainly 'no ground of public policy which requires such severance'. The decisions relating to severability of covenants in restraint of trade were not applicable and, even if they were, the offending provisions in the 1939 agreement were not supported by separate consideration but were inextricably interwoven with the other promises in the agreement.

McNair J. considered the matter primarily from the point of view of the common law rules relating to trading with the enemy. But it was clear, he thought, that the defendant Company, despite its acquisition of enemy character, remained subject to all the prohibitions imposed by section 1 of the Trading with the Enemy Act, 1939, to the same extent as a British subject residing in Great Britain.<sup>2</sup>

Significantly, he added the comment that, even if the Company was to be regarded as a British subject voluntarily resident in Germany, it would not follow that it would be freed from the prohibitions imposed by the Trading with the Enemy Act. 'Many of the old decisions', he said, 'dating from a more liberal age which suggest that British subjects in enemy territory enjoy a measure of freedom of action in their dealings with the enemy are of doubtful authority to-day.' (At p. 539.)

D. H. N. JOHNSON

#### B. PRIVATE INTERNATIONAL LAW

##### *Public policy—Foreign revenue law—Claim by foreign Government in winding-up of company—Enforceability in England*

Case No. 1. It will be recalled that in a previous issue of this *Year Book*<sup>3</sup> attention was drawn to the case of *Re Delhi Electric Supply and Traction Co. Ltd.*,<sup>4</sup> where the Court of

<sup>1</sup> [1916] 2 A.C. 307, at p. 533. The headnote to this well-known case reads as follows:

'*Seemle* a company incorporated in the United Kingdom and carrying on business here or in a neutral country by properly authorized agents resident here or in the neutral country is prima facie to be regarded as a friend; but it will assume an enemy character if its agents or the persons de facto in control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies; and any person knowingly dealing with a company in such a case is trading with the enemy. The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies. A company incorporated in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.'

<sup>2</sup> According to section 1 (1) of this Act, 'Any person who trades with the enemy within the meaning of this Act shall be guilty of an offence of trading with the enemy.' Also section 1 (2) states that 'For the purposes of this Act a person shall be deemed to have traded with the enemy—(a) if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy'; whilst, under section 2 (1) (b), 'enemy' includes 'any individual resident in enemy territory'.

<sup>3</sup> Vol. 30 (1953), pp. 520-1.

<sup>4</sup> [1953] 2 All E.R. 1452.



Appeal re-affirmed the principle that the English courts will not accord extra-territorial validity to the revenue laws of a foreign State. An appeal from the decision of the Court of Appeal in this case has recently been dismissed, the judgment of the House of Lords being reported *sub nom. Government of India, Ministry of Finance v. Taylor*, [1955] 2 W.L.R. 303.

There is no need to recapitulate the facts, since the issues before the House of Lords can be conveniently summarized as follows:

- (a) Whether there is a rule of law which precludes a foreign State from enforcing claims for taxes due under the law of that State;
- (b) Whether, if there is such a rule of law, a claim for taxes due under the law of India is nevertheless a 'liability' within the meaning of section 302 of the Companies Act, 1948.

Their Lordships found no difficulty in answering question (a) in the affirmative. Lord Simonds referred first of all to the modern cases of *In re Visser*,<sup>1</sup> *Sydney Municipal Council v. Bull*,<sup>2</sup> and *King of the Hellenes v. Brostron*<sup>3</sup> as acknowledging the validity of the proposition that the English courts would not entertain a suit by a foreign State to recover a tax. He then proceeded to trace the history and origin of the rule, which appeared to have originated in the formula adopted by Lord Mansfield in a series of cases<sup>4</sup> to the effect that 'no country ever takes notice of the revenue laws of another', this formula being later accepted without qualification by Lord Kenyon.<sup>5</sup> Moreover, he rightly recalled that counsel for the appellant had conceded that he knew of no case in which a foreign State had recovered taxes by suit in this country nor of any case in any foreign country in which the Government of this country had done so.

Accordingly, Lord Simonds was not persuaded by counsel's principal argument that Lord Mansfield's formula had extended, and wrongly extended, to revenue laws a doctrine applicable only to penal laws, nor by counsel's subsidiary argument that, whatever the rule may have been in the past, there was now a tendency towards mitigation of that rule as between member States of a federation and that this tendency should equally operate as between member countries of the Commonwealth. It had been suggested that the test of whether a foreign revenue law should be enforced in England should be whether the tax which it imposed was penal or discriminatory, and that if a tax is the sort of tax which is recognized in this country it should not be regarded as penal; but Lord Simonds was not disposed to accept such a refinement.

Lord Keith of Avonholm, in concurring with the views expressed by Lord Simonds, referred to an unreported judgment of Kingsmill Moore J. in the High Court of Eire on 21 July 1950 in the case of *Peter Buchanan Ltd. and Another v. McVey*<sup>6</sup> which, His Lordship asserted, illustrated two propositions:

- (1) that there are circumstances in which the courts will have regard to the revenue laws of another country;

<sup>1</sup> [1928] Ch. 877; noted in this *Year Book*, 10 (1929), pp. 252-3.

<sup>2</sup> [1909] 1 K.B. 7.

<sup>3</sup> (1923), 16 Ll. L. Rep. 190.

<sup>4</sup> *Holman v. Johnson* (1775), 1 Cowp. 341; *Planché v. Fletcher* (1779), 1 Doug. 251; *Lever v. Fletcher* (1780), unreported.

<sup>5</sup> *Clugas v. Penaluna* (1791), 4 Term. Rep. 466; *Bernard v. Reed* (1794), 1 Esp. 91; *Waymell v. Reed* (1794), 5 Term. Rep. 599.

<sup>6</sup> In this case the plaintiff company was registered in Scotland and had been put into liquidation under a compulsory winding-up order in respect of a very large claim for excess profits tax and income tax due to the revenue authorities in Scotland. The defendant held virtually all the shares of the company and was one of the two sole directors. In his capacity as director, he succeeded in satisfying the creditors of the company other than the Revenue and then, by a variety of devices, transferred the balance of the assets of the company to his credit with an Irish bank and decamped to Ireland. An action at the instance of the company directed by the liquidator was instituted to recover the balance, but the Court held that the action was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another country, and accordingly found for the defendant.

- (2) that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country

He accordingly had no hesitation in affirming the validity of the rule set out in question (a).

As regards question (b), Lord Simonds declared that the issue turned on the meaning of the word 'liabilities' in section 302 of the Companies Act, 1948:

'On the one hand, it is said by the respondents that it means only those obligations which are enforceable in an English court, and on the other hand, that its meaning is extended—I do not know how far—but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.'<sup>1</sup>

His Lordship had no doubt that the former of these meanings was the correct one, even if it meant that the word 'liabilities' had a different meaning in section 302 from the meaning of the word in other sections of the same Act. Lord Keith of Avonholm, on the other hand, thought the word 'liabilities' in section 302 included the assessment to Indian income tax; but this particular liability was unenforceable and so did not need to be taken into account in distributing the assets. The position was similar to that which arose when there was a debt statute-barred in England but not statute-barred in another country. If there were assets in that other country sufficient to meet the debt, a liquidator might be compelled to recognize the debt as a liability that had to be discharged; but if there were no assets in that country, the liquidator could not be compelled to pay the debt out of assets in his hands in England.

This judgment of Their Lordships provides welcome confirmation of a rule which had hitherto been regarded as almost self-evident. The lack of recent authority for the rule can be explained, as Lord Somerwell of Harrow suggested, by the fact that Governments have not, in the past, thought it appropriate to seek to use legal process abroad against debtor taxpayers, if only because they considered that the use of such process might appear to involve an assertion of sovereign authority within the territory of another State.<sup>2</sup> Whatever the reason, however, it is clear that the rule that the courts of this country will not assist directly or indirectly in enforcing the revenue laws of another country is now firmly established.

*Marriage—Formal validity—Invalid religious ceremony—Subsequent retrospective validating legislation*

Case No. 2. The case of *Pilinski v. Pilinska*, [1955] 1 W.L.R. 329, need only be reported very briefly, since, although it was concerned with the retrospective validation of marriages formally invalid by the *lex loci celebrationis*, it was clearly distinguishable on the facts from the more celebrated case of *Starkowski v. Attorney-General*.<sup>3</sup>

In *Pilinski v. Pilinska*, the parties, who were Poles, went through a religious ceremony of marriage in the Hamburg area of Germany in August 1946, but there was never at

<sup>1</sup> [1955] 2 W.L.R. 303 at p. 310.

<sup>2</sup> That this is the true *rationale* of the rule is indicated by the fact that the eighteenth-century cases decided by Lord Mansfield and Lord Kenyon (see *supra*, p. 313, nn. 4 and 5) appear to have been concerned merely with the principle (now obsolete) that the English courts will refuse to recognize the invalidating effect of an English revenue law upon a contract, whatever its proper law, if the plaintiff merely had knowledge of the illegality of the object of the contract under English law and did not actively assist in the furtherance of the illegal object: see Michael Mann in *International and Comparative Law Quarterly*, 3 (1954), pp. 465-78, and 4 (1955), pp. 564-7. The basic principle is therefore founded on considerations of public policy, namely, that one State will not assist the governmental authorities of another State to enforce public claims deriving from legislation enacted within the limits of the latter State's territorial jurisdiction; for to do so would necessarily entail recognizing the extraterritorial operation of a manifestation of the sovereign executive power of a foreign State.

<sup>3</sup> [1952] 1 All E.R. 495; [1952] 2 All E.R. 616 (C.A.); [1953] 3 W.L.R. 942 (H.L.); noted in this *Year Book*, 20 (1952), pp. 479-81, and 30 (1953), pp. 523-4.



any time a civil ceremony of marriage between them as required by German law. The husband now petitioned for a decree of nullity.

Mr. Commissioner Latey heard expert evidence to the effect that in August 1948 a German decree was promulgated under the authority of the Allied Control Commission, the effect of which was to validate such religious ceremonies as this retrospectively if duly registered at the register office in Hamburg not later than 31 December 1950. However, the marriage certificate in the present case purported to be a copy of the marriage entry in the register of Papenburg bearing the date of 18 November 1947; no other registration of the marriage had been effected. The expert in German law, furthermore, gave evidence to the effect that the registration at Papenburg was merely a local and temporary arrangement between the district registrar and the Polish priest who performed the ceremony placing on record that there had been a religious marriage ceremony, and that, accordingly, the Papenburg registration was not effective to validate the marriage in German law.

On this evidence, Mr. Commissioner Latey found no difficulty in holding that the marriage was invalid on the basis that the *lex loci celebrationis* alone governs the form and formalities of a marriage.<sup>1</sup> *Starkowski v. Attorney-General* was distinguishable since in that case the proviso as to registration which was contained in the retrospective validating decree had been complied with; here, however, the provisions of the 1948 decree as to registration had not been complied with and so no question of recognizing a retrospective validation could arise.

*Marriage—Divorce under Indian and Colonial Divorce Jurisdiction Act, 1926—Re-marriage in India within six months of decree absolute—Effect of Indian Divorce Act, 1869—Indian nullity decree*

Case No. 3. *Buckle v. Buckle*, [1955] 3 W.L.R. 989, relates primarily to the construction of certain Indian statutes, but it does involve some points of interest to private international lawyers, particularly in connexion with the recognition of foreign nullity decrees.

The facts were that the wife had been previously married to a member of the Indian Civil Service who was granted a decree *nisi* of divorce in Lahore on 29 November 1943 on the ground that the wife had committed adultery with the petitioner in the present suit. The decree purported to have been granted under the jurisdiction conferred by the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, and, although the normal period between decrees *nisi* and absolute was then six months,<sup>2</sup> the decree was in fact made absolute on 31 March 1944. The parties in the present suit were married in Quetta (Pakistan) on 3 April 1944 and they last lived together in Hong Kong or Canton in May 1950.

In 1953 the wife filed a nullity petition in Delhi under section 18 of the Indian Divorce Act, 1869. She claimed to be domiciled in India, stating that her parents were born in India; service of the petition was by advertisement in an Indian newspaper and the husband remained in ignorance of the Indian proceedings until the present proceedings had begun. The Indian Court granted the wife a nullity decree on the ground that her marriage to the petitioner in the present suit had been celebrated within six months of the dissolution of her previous marriage, contrary to section 57 of the Indian Divorce Act, 1869.<sup>3</sup>

<sup>1</sup> *Berthiaume v. Dastous*, [1930] A.C. 79.

<sup>2</sup> Rule 20 of the Indian (Non-Domiciled Parties) Divorce Rules, 1927 [S.R. & O. (1927) No. 698], provides that, except in cases where an appeal is pending, no decree *nisi* shall be made absolute till after the expiration of six months from the pronouncing thereof; but this rule was amended in 1941 by the Indian (Non-Domiciled Parties) Divorce (Amendment) Rules, 1941 [S.R. & O. (1941), No. 22] to give the Court discretion to fix a shorter time by general or special order.

<sup>3</sup> This section provides that 'when six months after the date of an order of the High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or

The husband now filed a petition for divorce in the English courts, alleging desertion; this petition was subsequently amended to pray in the alternative for a decree of nullity.

Karminski J. found that the wife was in desertion of the husband; the only difficulty related to the nullity proceedings in India. The learned Judge evinced surprise that the husband had not been served in the Indian proceedings and pointed out that the judgment of the Indian Court appeared to have been based on some misapprehension of the facts relative to the domicile of the wife. The original divorce decree had been granted under the provisions of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, which conferred on the Indian courts jurisdiction in certain cases with respect to the dissolution of marriages between parties domiciled in England or Scotland. Proviso (b) to section 1 of the Act stipulated that

'any such court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief'.

Karminski J. accordingly held that, as there was no provision in any English statute parallel to section 57 of the Indian Divorce Act, 1869, the parties to any divorce decree granted under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, were free to marry as soon as the divorce decree had been made absolute. Accordingly, the marriage between the parties in the present proceedings was a perfectly valid marriage, and the husband was entitled to a decree *nisi* of divorce on the ground of the wife's desertion.

Without wishing to criticize the decision reached by Karminski J., it is submitted, with all due respect, that greater attention might have been paid to the question of the recognition in England of the Indian nullity decree. Now, it is generally conceded that a foreign nullity decree, whether in respect of a void or a voidable marriage, which is pronounced by the courts of the country in which both parties are domiciled, is entitled to recognition in England;<sup>1</sup> furthermore, since the English courts assume jurisdiction to grant a nullity decree in respect of a void marriage on the basis of the domicile of the petitioner alone within England,<sup>2</sup> there seems no sound reason why they should not also recognize nullity decrees granted by foreign courts on the basis of the domicile of the petitioner alone within the jurisdiction.<sup>3</sup> Equally, it would appear, having regard to the case of *Ramsay-Fairfax v. Ramsay-Fairfax*<sup>4</sup> and to the demands of reciprocity, that a foreign nullity decree, whether in respect of a void or a voidable marriage, which is pronounced by the courts of the country in which both parties are resident, should be recognized in England. It is clear from *De Reneville v. De Reneville*<sup>5</sup> that the residence of the petitioner alone within the jurisdiction of the foreign court would not be sufficient to warrant recognition of any resulting nullity decree in England, at least in respect of a voidable marriage. If, of course, the foreign court had exercised jurisdiction on the basis of three years' residence by the wife, then, since the English courts would exercise jurisdiction by statute in parallel circumstances,<sup>6</sup> the principle laid down in *Travers v. Holley*<sup>7</sup> would presumably operate to ensure that the resulting nullity decree, whether when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death'.

<sup>1</sup> *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641; noted in this *Year Book*, 9 (1928), pp. 169-71, 181-3.

<sup>2</sup> *White v. White*, [1937] P. 111; noted in this *Year Book*, 19 (1938), pp. 252-3. The Court of Appeal has approved this decision in so far as the jurisdiction is based on the ground of domicile of the petitioner alone: *De Reneville v. De Reneville*, [1948] P. 100, 112-13.

<sup>3</sup> See Cheshire, *Private International Law* (4th ed.), pp. 355-6.

<sup>4</sup> [1955] 3 W.L.R. 188; [1955] 3 W.L.R. 849 (C.A.)—noted *infra*, pp. 319-23.

<sup>5</sup> [1948] P. 100; noted in this *Year Book*, 25 (1948), pp. 429-32.

<sup>6</sup> Matrimonial Causes Act, 1950, s. 18 (1) (b).

<sup>7</sup> [1953] 3 W.L.R. 507.



in respect of a void or a voidable marriage, would be recognized in England. Finally, while the case of *Casey v. Casey*<sup>1</sup> makes it clear that the foreign annulment of a voidable marriage based solely upon the marriage of the parties in the forum will not be recognized by the English courts, there is some slight authority for the view that the jurisdiction of a foreign court based upon the place of marriage will be recognized in the case of the annulment of a void marriage.<sup>2</sup>

Now, how do these principles apply to the present case? It is necessary to determine in the first place whether the ground for annulment of the second marriage was such as to render the marriage void or voidable. This question is referable to the law of the second husband's domicile or, preferably, the law of the matrimonial domicile,<sup>3</sup> as the alleged ground for annulment does not relate to the formal validity of the ceremony. Now, the second husband appears, on the facts, never to have lost his English domicile of origin, and as it seems unlikely that the parties acquired a domicile of choice in any other country during the subsistence of the marriage, it is probable that the question of whether the alleged ground rendered the marriage void or voidable should be tested by English law; on this hypothesis, the alleged ground for annulment would have rendered the marriage void and accordingly the wife would never have acquired the domicile of her second husband. It is impossible on the facts as given in the report to determine where the respondent wife was domiciled when she instituted the nullity proceedings in India, but this point does not seem very material since the second marriage was celebrated at Quetta (now in Pakistan, but at the time of the second marriage in undivided India), so that India was, at least at the time of the celebration of the marriage, the *forum celebrationis*.

If the fact that India was the *forum celebrationis* at the material time is sufficient to render the Indian courts competent to exercise jurisdiction to annul a marriage where the alleged defect is such as to render the marriage void *ab initio*, can it be objected that, nevertheless, the decree should not be recognized because the Indian Court either applied the wrong choice of law rule or misinterpreted its own law? This is a very debatable point, for, although there is authority for the view that a nullity decree pronounced by the courts of the common domicile must be recognized regardless of the choice of law rule applied by the foreign court,<sup>4</sup> there is no direct authority for saying that a foreign nullity decree pronounced by a court of competent jurisdiction other than that of the common domicile, cannot be impeached on the merits.<sup>5</sup> Cheshire<sup>6</sup> appears to take the view that in such circumstances the decree should be unimpeachable, but it must be confessed that the position is by no means clear. The whole tendency of English private international law is now in the direction of widening the bases of jurisdiction and of recognition of

<sup>1</sup> [1949] P. 420; noted in this *Year Book*, 26 (1949), pp. 471-2.

<sup>2</sup> It is not clear whether, in *Mitford v. Mitford*, [1923] P. 130, Sir Henry Duke recognized the German nullity decree on the ground that Germany was the common residence of the parties or the *locus celebrationis*. However, the English courts assume jurisdiction in nullity proceedings on the basis of the celebration of a void (as distinct from voidable) marriage in England, notwithstanding that the respondent is domiciled and resident abroad: *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67. This principle applies even if the ground alleged is not related to the formal validity of the ceremony: *Linke v. Van Aerde* (1894), 10 T.L.R. 426 (bigamy). Furthermore, in *Addison v. Addison*, [1955] N.I. 1, the High Court of Northern Ireland assumed jurisdiction in respect of the annulment of a voidable marriage on the basis of the celebration of the marriage in Northern Ireland, notwithstanding that the respondent was both domiciled and resident in England.

<sup>3</sup> *De Reneville v. De Reneville*, [1948] P. 100, 114, *per* Lord Greene M.R.

<sup>4</sup> *De Massa v. De Massa*, [1939] 2 All E.R. 150 n.; *Galene v. Galene*, [1939] P. 237. These cases are noted, respectively, in this *Year Book*, 13 (1932), pp. 169-70, and 21 (1944), pp. 203-4.

<sup>5</sup> In *Mitford v. Mitford*, however, Sir Henry Duke, having held that the German court was a court of competent jurisdiction probably by virtue of the common residence of the parties but possibly because Germany was the *forum celebrationis*, concluded as follows:

"The petitioner's real ground of challenge seems to me to be that . . . the decision was wrong on the merits. Into that question I am, as I think, not entitled to go"; [1923] P. 130, 142.

<sup>6</sup> *Op. cit.*, p. 359.

foreign judgments in nullity and divorce, and there is a growing realization that an extension of the bases of jurisdiction can in principle only be justified if the English courts are prepared to apply the proper choice of law rule;<sup>1</sup> a necessary corollary to a development on these lines would be that while the English courts were prepared to recognize that a foreign court exercising jurisdiction on grounds substantially similar to those on which an English court would exercise jurisdiction was a court of competent jurisdiction, they would not recognize a foreign nullity or divorce decree unless the foreign court had applied the proper choice of law rule.

Whatever may be the present position in this respect, however, the actual decision in the present case can be justified on an entirely different ground. The facts establish that the second husband received no notice of the nullity proceedings in India. While it may be conceded that absence of notice of the proceedings does not necessarily entail non-recognition in England of any resulting foreign nullity or divorce decree,<sup>2</sup> it is submitted that absence of notice can operate as a bar to the recognition in England of a foreign nullity or divorce decree if the facts disclose any element of fraud on the part of the petitioner in the foreign proceedings.<sup>3</sup> In this particular case, there was, at the very least, a strong suspicion of fraud since Karminski J. found that the wife had been in correspondence with the husband shortly before the institution of the Indian proceedings, and that indeed the husband's solicitors and the wife's solicitors were in touch at the relevant time; consequently, the wife was presumably well aware of the husband's address, and the fact that the husband was never informed of the Indian proceedings or served with the necessary documents *prima facie* indicates an element of fraud on the part of the wife petitioner in the Indian proceedings sufficient to warrant non-recognition of the Indian decree.

The decision in this case is accordingly more interesting for the questions it provokes than for the actual issue which it decides. It is perhaps regrettable that the judgment is silent on the question of recognition of the Indian nullity decree and that Karminski J. preferred to base his decision on the narrower ground of interpretation of the two Indian statutes. The Indian decree was open to attack on several grounds—that it was not pronounced by a court of competent jurisdiction, or that, even if it was, that court applied the wrong choice of law rule by misinterpreting the facts relative to the wife's domicile, or that there was a sufficient element of fraud in the circumstances surrounding the fact that the husband received no notice of proceedings; but it is surely a trifle unusual for the case to be re-tried on the merits without a fuller consideration of the preliminary issue as to whether or not the Indian nullity decree was entitled to recognition by the English courts.

*Divorce—Foreign decree—Jurisdiction of foreign court—Domicil—Recognition of decree by English court*

Case No. 4. As the present reviewer has had occasion to remark in a previous issue of this *Year Book*,<sup>4</sup> and as many writers have also indicated,<sup>5</sup> the scope of the rule in *Travers*

<sup>1</sup> See, *inter alia*, the article by Gravson in this *Year Book*, 28 (1951), pp. 279-80. It should be noted that, in *Ramsay-Fairfax v. Ramsay-Fairfax*, Willmer J. drew particular attention to the fact that the grounds for nullity in Scotland (which was the domicile of the parties) were exactly the same as in England, so that the problem of choice of law did not arise: [1955] 3 W.L.R. 188, 196.

<sup>2</sup> *Maher v. Maher*, [1951] P. 343; *Igra v. Igra*, [1951] P. 404. Both cases are noted in this *Year Book*, 28 (1951), pp. 408-9.

<sup>3</sup> Foreign judgments are impeachable for fraud in England: cf. *Ochsenbein v. Papelier* (1873), L.R. 8 Ch. App. 695, where a French judgment fraudulently obtained by default was refused recognition in England, and *Cheshire*, op. cit., pp. 625-30, where the authorities are critically examined.

<sup>4</sup> Vol. 30 (1953), pp. 527-30.

<sup>5</sup> Thomas in *International and Comparative Law Quarterly*, 3 (1954), pp. 156-9; Garland in *Law Journal*, vol. 103, pp. 602-3; Prevezer in *Current Legal Problems*, 7 (1954), pp. 132-5.



*v. Holley*<sup>1</sup> remains to be clarified in the English courts. The case of *Dunne v. Saban*,<sup>2</sup> which has been adversely criticized in many quarters,<sup>3</sup> indicated that the new principle of according recognition to foreign divorces pronounced in exercise of a non-domiciliary statutory jurisdiction comparable to that which the English courts can exercise applied only where the grounds upon which the foreign court exercised jurisdiction were similar to the grounds upon which an English court could have exercised jurisdiction.

*Carr v. Carr*, [1955] 1 W.L.R. 422, adds little to the development and definition of the rule in *Travers v. Holley*. The facts were that in February 1954 a wife was granted a decree *nisi* of divorce on the ground of desertion by the High Court of Justice in Northern Ireland, the Court assuming jurisdiction under section 26 of the Matrimonial Causes Act, 1939, of Northern Ireland which provided that 'where a wife has been deserted by her husband . . . and the husband was immediately before the desertion . . . domiciled in Northern Ireland, the court shall have jurisdiction for the purpose of any proceedings taken by the wife in a matrimonial cause or matter, notwithstanding that the husband has changed his domicile since the desertion . . .'. This section, which is in substantially identical terms to section 18 (1) (a) of the Matrimonial Causes Act, 1950, was invoked as the basis for the exercise of jurisdiction by the Northern Ireland Court because, at the date of the petition, which was filed in 1948, the husband had acquired a domicile of choice in England, although it appeared to the Court that the parties had been domiciled in Northern Ireland when the husband deserted the wife in 1942.

The husband now presented in England a petition for dissolution of the marriage on the ground of the wife's desertion since 1941. The wife in her answer denied that the husband was domiciled in England at the date of his petition, and alleged that, in any event, he was domiciled in Northern Ireland at the commencement of his desertion as had been established by the decree of the Northern Ireland Court and that he was therefore estopped from making the allegations contained in the petition.

Barnard J., basing himself on certain remarks made by Jenkins L.J. in his dissenting judgment in *Travers v. Holley*, found that the husband had been domiciled in Northern Ireland until October 1942, and that, at a subsequent date, which was probably 1945, he had acquired a domicile of choice in England. He does not appear specifically to have rejected the estoppel argument,<sup>4</sup> but, since he held, on the basis of *Travers v. Holley*, that the decree of the Northern Ireland Court was entitled to recognition in England because the Northern Ireland Court had exercised a statutory jurisdiction substantially identical to the statutory jurisdiction of the English courts and that consequently there was no marriage for him to dissolve, it may be inferred that he impliedly rejected the estoppel argument.

There can be no doubt that this was a case where application of the *Travers v. Holley* doctrine was fully justified. Barnard J. was not required to consider any of the more refined variations of circumstances in which the *Travers v. Holley* principle could conceivably operate; and while this detracts in a sense from the value and importance of the judgment, it is at least gratifying to note this further application of the *Travers v. Holley* rule.

#### *Nullity—Voidable marriage—Jurisdiction of English courts—Common residence of the parties in England*

Case No. 5. The decision of the Court of Appeal in *Ramsay-Fairfax v. Ramsay-Fairfax*, [1955] 3 W.L.R. 188; [1955] 3 W.L.R. 849 (C.A.), is an important landmark in

<sup>1</sup> [1953] 3 W.L.R. 507.

<sup>2</sup> [1954] 3 W.L.R. 980; noted in this *Year Book*, 31 (1954), pp. 472-4.

<sup>3</sup> Garland in *Law Journal*, vol. 105, pp. 179-80; Stone in *Modern Law Review*, 18 (1955), pp. 177-80; Kennedy in *International and Comparative Law Quarterly*, 4 (1955), pp. 389-93.

<sup>4</sup> Thomas has indicated disapproval of the application of estoppel in these circumstances, since English divorce law is not based on the principle of simple dissolution of contract: see *International and Comparative Law Quarterly*, 3 (1954), p. 159.

the jungle of judicial authority on the controversial question of the bases on which an English court will exercise jurisdiction in nullity proceedings. The position prior to *Ramsay-Fairfax v. Ramsay-Fairfax* was that, while it was clearly established that an English court would exercise jurisdiction in nullity proceedings in respect of a void or a voidable marriage on the basis of the common domicile of the parties in England,<sup>1</sup> there was considerable confusion as to whether the English courts could exercise nullity jurisdiction in respect of either a void or a voidable marriage, on the basis of the common residence of the parties in England,<sup>2</sup> the residence in England of the petitioner alone being clearly insufficient<sup>3</sup> except as provided by statute.<sup>4</sup> The Court of Appeal has now come down firmly in favour of the view that the English courts are competent to exercise jurisdiction in respect of the annulment of a voidable marriage on the basis of the residence of both parties in England.

The facts in *Ramsay-Fairfax v. Ramsay-Fairfax* were relatively simple. The parties were married in Egypt in 1947 under the provisions of section 22 of the Foreign Marriages Act, 1892, the husband being, at all material times, an officer serving in Her Majesty's forces. They lived together for a short time in Egypt, but separated shortly before the husband, whose domicile of origin was in Scotland, was posted back to the United Kingdom. The wife resided in Egypt and then Cyprus until, in 1953, she returned to England where she re-joined the husband but later separated from him again after a quarrel. In March 1954, the wife filed a petition for nullity in the English courts on the ground of the husband's wilful refusal to consummate the marriage or alternatively on the ground of his incapacity. At the time of presentation of the petition, both the wife and the husband were resident in England.

Willmer J. found, on the facts, that the husband was at all material times domiciled in Scotland and, since it was clear that the wife could not avail herself of the provisions of section 18 (1) (b) of the Matrimonial Causes Act, 1950,<sup>5</sup> the principal issue before the Court was whether the common residence of the parties in England was sufficient to enable the Court to assume jurisdiction in respect of the annulment of a voidable marriage.

The learned Judge, in a searching survey of the authorities, pointed out that at one time there had been authority for the proposition that the mere residence of the petitioner wife in England was sufficient to found jurisdiction in nullity, even if the husband was domiciled and resident elsewhere. The cases establishing this proposition,<sup>6</sup> in so far as

<sup>1</sup> *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641; noted in this *Year Book*, 9 (1928), pp. 169-71, 181-3.

<sup>2</sup> In *Inverclyde v. Inverclyde*, [1931] P. 29, Bateson J. held that the court of the common domicile of the parties had exclusive jurisdiction to annul a voidable, as distinct from a void, marriage. However, in *Easterbrook v. Easterbrook*, [1944] P. 10, and *Hutter v. Hutter*, [1944] P. 95, the Court assumed jurisdiction to annul a voidable marriage on the basis of the common residence of the parties in England. In *De Reneville v. De Reneville*, [1948] P. 100, and *Casey v. Casey*, [1949] P. 420, the Court of Appeal expressly left open the question whether the Court should exercise nullity jurisdiction in respect of a voidable marriage on the basis of the common residence of the parties in England.

<sup>3</sup> *De Reneville v. De Reneville*, [1948] P. 100; noted in this *Year Book*, 25 (1948), pp. 429-32.

<sup>4</sup> Matrimonial Causes Act, 1950, sections 18 (1) (a) and (b).

<sup>5</sup> This clause provides that the Court has jurisdiction at the instance of a wife 'in the case of proceedings for divorce or nullity, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man'. Apart from the fact that the husband in this case was found to be domiciled in Scotland, the wife had not in any event fulfilled the statutory requirement of three years ordinary residence in England; the statutory jurisdiction provided by the section was therefore wholly inapplicable in this case.

<sup>6</sup> *Roberts v. Brennan*, [1902] P. 143; *White v. White*, [1937] P. 111; *Robert v. Robert*, [1947] P. 164. *Roberts v. Brennan* related to nullity proceedings in respect of a void marriage; in any event, it is by no means clear from the report whether the wife petitioner was resident in England—but, as the respondent was certainly resident in Ireland, the residence of the wife petitioner in



they were based on the mere residence of the petitioner alone, had, however, been overruled by *De Reneville v. De Reneville*.

Willmer J. then turned to the apparent conflict between *Inverclyde v. Inverclyde*,<sup>1</sup> on the one hand, and *Easterbrook v. Easterbrook*<sup>2</sup> and *Hutter v. Hutter*,<sup>3</sup> on the other hand, on the question whether the common residence of the parties afforded a sufficient basis for the exercise of nullity jurisdiction by an English court in respect of a voidable marriage. In the former case, Bateson J. had held that in the case of proceedings for nullity where the marriage was alleged to be voidable, nothing short of the common domicile of the parties would suffice to found jurisdiction. In *Easterbrook v. Easterbrook* (which was an undefended suit), however, Hodson J. declared that he was unable to see the distinction, for purposes of jurisdiction, between void and voidable marriages, and held that he had jurisdiction to entertain nullity proceedings in the case of a voidable marriage on the ground that both parties were resident in England and the marriage had been celebrated in England. Pilcher J. broadly followed this line of reasoning in *Hutter v. Hutter*, where he had the advantage of hearing argument on behalf of the King's Proctor. In addition, he based his decision in that case on the fact that the jurisdiction of the Court in respect of nullity was in essence derived from that of the old ecclesiastical courts,<sup>4</sup> which, as a matter of history, had exercised jurisdiction in respect of matters within their competence on the basis of the residence of the respondent within the territorial jurisdiction of the particular court before which he was cited to appear.

Willmer J. then pointed out that the decision in *Inverclyde v. Inverclyde* was based largely upon an *obiter dictum* of Lord Phillimore in *Salvesen v. Administrator of Austrian Property*<sup>5</sup> and upon the distinction between void and voidable marriages. He conceded that the distinction between void and voidable marriages was necessary for some purposes, but he did not think it was necessary for the purpose of determining jurisdiction where both parties were resident in England. Finally, he asserted that *Inverclyde v. Inverclyde* had been adversely criticized by several leading textbook writers.<sup>6</sup>

England must have been held sufficient to found jurisdiction. *White v. White* was also concerned with nullity proceedings in respect of a void marriage, and Bucknill J. held that the English courts were competent to exercise jurisdiction on the ground that the wife petitioner was both domiciled and resident in England. The Court of Appeal has approved the decision in *White v. White* in so far as it affirms the principle that jurisdiction is exercisable in the case of a void marriage on the ground of the domicile of one party in England: *De Reneville v. De Reneville*, [1948] P. 100, 112-13.

<sup>1</sup> [1931] P. 29; noted in this *Year Book*, 13 (1932), pp. 168-9, 179-80.

<sup>2</sup> [1944] P. 10.

<sup>3</sup> [1944] P. 95; noted, together with *Easterbrook v. Easterbrook*, in this *Year Book*, 22 (1945), pp. 279-85.

<sup>4</sup> When the matrimonial jurisdiction of the old ecclesiastical courts was transferred to the new Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act, 1857, it was specifically provided by section 22 of that Act that in all suits and proceedings (other than for divorce) the Court should proceed and act and give relief on principles and rules '... as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief'. Although this section was repealed by the Judicature (Consolidation) Act, 1925, its substance was re-enacted by section 32 of that Act.

<sup>5</sup> 'If the court is a competent court, still more if it is the only competent court—and in my opinion the Wiesbaden court was the only competent court for these parties [both being domiciled in Germany]—its judgment must for the very reason of the thing be ... a definitive decree declaring a marriage void which should be universally binding and which should ascertain and determine the status of the parties once and for all'; [1927] A.C. 641 at p. 671, *per* Lord Phillimore.

<sup>6</sup> Willmer J. cited Rayden, *Divorce* (6th ed.), pp. 37-38, note (h), and (5th ed.), Appendix, p. 175, as critical of *Inverclyde v. Inverclyde*. As against this, however, Morris, *Cases on Private International Law* (2nd ed.), p. 140, Wolff, *Private International Law* (2nd ed.), p. 82, and Schmithoff, *Conflict of Laws*, p. 320, appear to approve the *Inverclyde v. Inverclyde* doctrine; so also does the reviewer of *Easterbrook v. Easterbrook* and *Hutter v. Hutter* in this *Year Book*, 22 (1945), pp. 279-85. Cheshire, *op. cit.*, pp. 332-3, finds it difficult to criticize the *Inverclyde v. Inverclyde* doctrine in principle, but argues in favour of wider bases of jurisdiction on grounds of convenience.

After rejecting an argument based on the fact that, as Parliament had extended the bases of jurisdiction in nullity by enacting section 18 of the Matrimonial Causes Act, 1950, there could be no jurisdiction in nullity based on the residence of the parties apart from the section, Willmer J. held, following *Hutter v. Hutter*, that as the parties were at all material times resident in England, the Court had jurisdiction to entertain the suit.

It is of importance to note that Willmer J., in his judgment, referred to Dr. Cheshire's criticism of the argument which prevailed in *Hutter v. Hutter* to the effect that the court today has jurisdiction in nullity because, historically, the matrimonial jurisdiction of the ecclesiastical courts was based on residence. Willmer J. also referred, with apparent approval, to Dr. Cheshire's suggestion that jurisdiction should be exercisable by the courts of the common residence of the parties provided those courts applied the proper choice of law rule:

'In other words common sense and reason demand that the court of the common residence should have jurisdiction, subject however to the proviso, on which Dr. Cheshire insists, that the court applies the proper law, i.e. the law of the domicile. This latter point is not one of any consequence in the present case; for I have an affidavit from a Scottish lawyer which satisfies me that, in relation to proceedings such as these, Scots law—i.e. the law of the domicile—is the same as English law.'<sup>1</sup>

The Court of Appeal unanimously affirmed Willmer J.'s decision, basing themselves purely on the principle that jurisdiction in nullity suits depends on the principles and rules which were observed in the ecclesiastical courts before 1857. Denning L.J., furthermore, took issue with the theory that, for purposes of jurisdiction, a distinction existed between void and voidable marriages in the sense that a nullity suit in respect of a voidable marriage was more akin to a suit for divorce than anything else:

'Looking at the ground of wilful refusal from a legalistic standpoint, and treating marriage as a contract, the remedy of nullity does look like a remedy of divorce or dissolution, because it depends on events which occur subsequent to the marriage; but looking at it from a sensible standpoint, and having regard to the true ends of marriage, one of the principal aims of which is the procreation of children, it seems to me that the remedy falls more truly within the category of nullity. No one can call a marriage a real marriage when it has not been consummated; and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it quite plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded upon residence and not upon domicile: so also the courts of the place where the marriage was celebrated: but the courts where both parties reside certainly have jurisdiction.'<sup>2</sup>

Denning L.J.'s *dictum* that the courts of the *forum celebrationis* have jurisdiction in respect of nullity proceedings derives some support from a very recent decision of the High Court of Justice in Northern Ireland in the case of *Addison v. Addison*.<sup>3</sup>

<sup>1</sup> [1955] 3 W.L.R. 188 at p. 196. If the law of the domicil had been applied in *Easterbrook v. Easterbrook*, the petitioner would have failed because the ground on which the marriage was annulled, though sufficient by English law, does not exist in any of the Canadian provinces as a ground for nullity. Equally, and for similar reasons, the petitioner in *Hutter v. Hutter* would have failed if the law of the domicil had been applied.

<sup>2</sup> [1955] 3 W.L.R. 849 at pp. 852-3.

<sup>3</sup> [1955] N.I. 1. In this case, Lord MacDermott L.C.J. exercised nullity jurisdiction in respect of a voidable marriage on the basis that the marriage had been celebrated in Northern Ireland, although the respondent was domiciled and resident in England. He held that in the exercise of the jurisdiction to annul a marriage, there was no ground for distinguishing between void and voidable marriages. No question of choice of law arose in this case, as the grounds upon which the decree was sought (namely, impotence or, alternatively, wilful refusal) are grounds for annulment in England.



It is submitted, with all due respect, that in so far as the decision of the Court of Appeal is based on the practice and procedure of the ecclesiastical courts before 1857, it is open to criticism on the lines suggested by Cheshire<sup>1</sup> and Wolff.<sup>2</sup> This is not to say that no case exists for the assumption of nullity jurisdiction by the English courts on the basis of the common residence of the parties, whether in respect of a void or a voidable marriage. Clearly, on grounds of convenience, it is desirable that the courts of the common residence of the parties should be permitted to entertain nullity proceedings instituted by one of the parties. It must be emphasized, however, that, at least in the case of a voidable marriage, the English courts would, in such circumstances, be purporting to alter the status of the parties concerned; accordingly, there are cogent and compelling reasons for attempting to secure that any decree emanating from an English court in such circumstances should command recognition in the country where the parties are domiciled. There is no certain method of achieving this desirable objective, but there can be no doubt that progress in this direction would be advanced if the English courts, in exercising divorce and nullity jurisdiction on a basis other than that of the common domicile of the parties, were to apply the law of the domicile of the parties (or, in appropriate cases, the law of the *forum celebrationis*)<sup>3</sup> to determine the merits of the issue brought before them.<sup>4</sup> Where the matrimonial jurisdiction of the English courts is founded on a basis other than that of the common domicile of the parties, it is surely indefensible to apply the *lex fori* to determine the merits of the dispute.<sup>5</sup> It is gratifying to note that the Royal Commission on Marriage and Divorce have recognized this problem and have recommended that 'in respect of both divorce and the annulment of a voidable marriage, we regard it as fundamental that the court, in determining the issues, should look to the personal law of the spouses as well as to English or Scots domestic law'.<sup>6</sup>

Although it is tempting to regret the final eclipse of the *Inverclyde v. Inverclyde* doctrine, inasmuch as that doctrine did provide a rational basis for the solution of the jurisdictional issue in nullity proceedings, it must be confessed that, with the gradual erosion of the principle that the courts of the domicile are alone competent to exercise jurisdiction in matrimonial causes, the *Inverclyde v. Inverclyde* doctrine had become increasingly open to attack. The task now is to ensure that, in the interests of avoiding 'limping marriages', attention is more clearly focused on the problem of choice of law when the courts are exercising jurisdiction in nullity cases on a basis other than that of the domicile of the parties. It is to be hoped that there is some significance in Willmer J.'s recognition that such a problem does in fact exist.

*Matrimonial property—Régime of community of property—Proceedings under Married Women's Property Act, 1882, section 17*

Case No. 6. The case of *In re Bettinson's Question*, [1955] 3 W.L.R. 510, should be of considerable interest to those practitioners who are called upon to deal with matrimonial property disputes where the parties are subject to the régime of *communauté des biens*.

A husband and wife, both American citizens domiciled in California, were at all material times resident in England. In January 1955 they separated and six months later the husband commenced divorce proceedings in California. In April 1955, however, the wife had removed from the husband's maisonette in London various chattels including, *inter alia*, various papers of his, a diary, and a judgment in his favour; later in the same month she removed his car from a garage and subsequently refused to return it. In May

<sup>1</sup> Op. cit., pp. 338-9.

<sup>2</sup> *Private International Law* (2nd ed.), p. 84.

<sup>3</sup> As, for example, where a marriage is alleged to be void on the ground of lack of formalities.

<sup>4</sup> The Report of the Royal Commission on Marriage and Divorce (Cmd. 9678) emphasizes that 'if the exercise of jurisdiction on the basis of residence is subject to the over-riding condition that the court must look to the personal law of the spouses as well as to English or Scots domestic law, decrees granted in this way will receive wide recognition': para. 828, p. 819.

<sup>5</sup> For the contrary view, see Stone in *Modern Law Review*, 18 (1955), pp. 604-7.

<sup>6</sup> Cmd. 9678: para. 895, p. 236.

1955, moreover, she procured her sister to withdraw two sums of money from the parties' joint banking accounts with two banks in America.

The husband now took out a summons asking for the determination under section 17 of the Married Women's Property Act, 1882,<sup>1</sup> of certain questions relating to property on the ground that, as between him and his wife, there existed certain questions as to the possession of property within the meaning of that section. He claimed the return of the chattels and the motor-car, and for an account and inquiries in respect of the two sums of money withdrawn on behalf of the wife from the two American banks.

It was not disputed that the law of the state of California (which was the domicile of both parties at all material times) governed the property relations between husband and wife,<sup>2</sup> nor that Californian law provided for the system of community of property. The real point at issue in the proceedings was whether the English Court had power to make the order sought by the husband. It was contended, on behalf of the wife, that no question arose as to title to or possession of property within the meaning of section 17 of the Married Women's Property Act, 1882, since section 172 of the Californian Civil Code merely gave the husband certain qualified rights of management and control of the personal property held in community. Counsel for the husband did not dispute that no question of title was involved on the summons; but he did, of course, assert that very real questions as to possession did exist between the parties.

Wynn-Parry J. found no difficulty in rejecting the argument put forward on behalf of the wife:

'If a man is given the right by the relevant law—and I treat the law of California for this purpose as being the relevant law—to manage and control the whole of the property subject to the community of property, then he must be entitled to possession of that property, either to physical possession or to such a degree of control as will enable him effectively to say what is to happen to that property.'<sup>3</sup>

The case of *Tunstall v. Tunstall*<sup>4</sup> was clearly distinguishable, because in that case there was no property or identifiable fund on which an order under section 17 of the Married Women's Property Act, 1882, could operate. In this case, however, a number of the items of personal property were identified and, as to the two sums of money, all that was being sought was that an inquiry should be held to find out whether or not an identifiable fund existed on which a further order might be made under section 17.

In the result, Wynn-Parry J. made an order directing the wife to deliver up the identified objects which she had removed, including the car. He further directed an account and inquiries in respect of the sums withdrawn by the wife from the American banks.

It may seem odd at first sight that the provisions of an English statute the primary purpose of which was to establish a system of separation of goods can be invoked in such a way that protection is afforded to one of the parties whose matrimonial property relations are governed by the system of community of property. Nevertheless, the decision is, it is submitted, to be welcomed, especially since there are indications in Wynn-Parry J.'s judgment that the Court was influenced by what a Californian court would have done had the circumstances arisen in California.<sup>5</sup>

<sup>1</sup> This section provides that 'in any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice in England or in Ireland, according as such property is in England or in Ireland . . . and the judge . . . may make such order with respect to the property in dispute . . . as he shall think fit'.

<sup>2</sup> In view of *De Nichols v. Curlier*, [1900] A.C. 21, it could hardly be argued that any other system of law than that of the husband's domicile or the matrimonial domicile (which were both California) was applicable.

<sup>3</sup> [1955] 3 W.L.R. 510 at p. 513.

<sup>4</sup> [1953] 2 All E.R. 310.

<sup>5</sup> Although Wynn-Parry J. declared that he was not concerned with the extent of the community of property, he maintained at a later stage that 'some of the items were entirely personal to [the husband]' and that a Californian court, if seized of the case, would have ordered the wife to return these personal items to the husband: [1955] 3 W.L.R. 510 at p. 512.



In conclusion, there seems to be no good reason in principle why section 17 of the Married Women's Property Act, 1882, should not be invoked in cases containing a foreign element, provided that the court applies the proper choice of law rule and gives the same relief as would be given by the courts of the domicile of the parties. Such a proposition would accord with the recent tendency of the courts to expand the bases of jurisdiction of the English courts and to pay more attention to the problems of choice of law.<sup>1</sup>

*Maritime law—Collision—Lis alibi pendens—Jurisdiction of foreign court founded by arrest of vessel in same ownership—Subsequent arrest of colliding vessel in England—English proceedings stayed*

Case No. 7. The case of *The Marinero*, [1955] 2 W.L.R. 607, presents several unusual features. The plaintiffs' vessel, the *Cressington Court*, had been in collision with the defendants' vessel, the *Marinero*, in Argentine waters. The defendants instituted proceedings in the Argentine courts and arrested the plaintiffs' vessel. The plaintiffs furnished security to obtain the release of their vessel but at no time put in any counterclaim in the Argentine proceedings. They attempted unsuccessfully to persuade the defendants to consent to the jurisdiction of either the English or the Dutch courts and eventually, to found jurisdiction in the Dutch courts, arrested the *Arriero*, a vessel in the same ownership as the *Marinero*, in a Dutch port and issued a writ. To secure the release of the *Arriero*, the defendants gave security conditional on the Dutch court exercising jurisdiction. Later, the plaintiffs arrested the *Marinero* in Liverpool and commenced an action in the English courts. A guarantee was furnished by the defendants for the release of the *Marinero* conditional upon the English courts exercising jurisdiction. The defendants moved for an order that the English proceedings be set aside or stayed, contending that in the circumstances the commencing of proceedings in England was vexatious and contrary to good faith.

The principal ground on which the defendants relied was that the plaintiffs had already previously commenced proceedings in the Netherlands arising out of the same collision that constituted the cause of action in the English proceedings and that, in the course of these proceedings in the Netherlands, the plaintiffs had obtained adequate security by arresting another ship belonging to the same owners and receiving, in return for her release, a guarantee equivalent to bail. The defendants relied on *The Christiansborg*,<sup>2</sup> where proceedings in England were stayed on the ground that they were vexatious since the offending ship had previously been arrested in foreign proceedings in respect of the same cause of action.

The plaintiffs, on the other hand, argued that *The Christiansborg* did not deal with the position arising where the ship arrested in the foreign proceedings is another ship belonging to the same owners and not the ship which has been in collision and which is the subject of the English proceedings. They contended, furthermore, that the guarantee given by the defendants in the proceedings in the Netherlands was conditional on the Dutch court exercising jurisdiction; and that, since the defendants in the Dutch proceedings had pleaded that the Dutch courts had no jurisdiction by reason of the fact that the collision had taken place in Argentine waters, the plaintiffs would, if proceedings in England were stayed, find themselves without any security whatever should the Dutch court accept the plea to the jurisdiction raised by the defendants.

Willmer J. dealt first with the second contention of the plaintiffs. He pointed out that, as there was no evidence before the court as to the merit in Dutch law of the plea to the jurisdiction raised by the defendants in the Dutch proceedings, he must presume that Dutch law on the point was the same as English law; and, since it was admitted that such a plea to the jurisdiction would not be open to the defendants in English law, the

<sup>1</sup> For a further comment on this case, see Baskar and Webb in *Modern Law Review*, 19 (1956), pp. 206-8.

<sup>2</sup> (1885), 10 P.D. 141.

condition attached to the Dutch guarantee was really illusory and the second contention was accordingly unsubstantial.

As regards the first contention of the plaintiffs, Willmer J. admitted that the present case was not on all fours with *The Christiansborg*, but considered that the effect of what was done in the Netherlands was to purchase the immunity from arrest of the *Marinero*. The plaintiffs had their security in respect of the collision even if they had obtained it by the arrest of a ship other than the *Marinero*. The decision in *The Christiansborg* made it clear that the exact form of the security that was given and the method by which it was obtained was immaterial if the purpose of giving of security was to secure the future immunity of the ship and her future ability to continue trading. The defendants had given security in the Dutch proceedings with this object in view, and it would be vexatious to harass them further by arresting the *Marinero* in England. Consequently Willmer J., basing his decision on the fact that the plaintiffs had perfectly good security in the Netherlands, made an order staying the proceedings and relieving the defendants from the guarantee which had been given on their behalf.

The decision in this case, while clearly right, serves only to confirm the principle that the plea of *lis alibi pendens* must always be considered in relation to the facts of the particular case. What must be proved by the defendant is vexation in point of fact, and there is, and can be, no general definition of 'vexation'. In this particular case, the arrest of two separate ships in two distinct jurisdictions in respect of the same collision certainly bore the appearance of vexation, whatever may have been the motive of the plaintiffs in arresting the *Marinero* in England.

In conclusion, it should be noted that the decision in this case is in line with the provisions of the International Convention on the Arrest of Sea-Going Ships, signed at Brussels on 10 May 1952.<sup>1</sup> This Convention has not yet been ratified by the United Kingdom but legislation has been introduced in Parliament<sup>2</sup> (and is now in an advanced stage) to enable the English courts to give effect to the Convention if and when it is eventually ratified on behalf of the United Kingdom.

*Foreign bank dissolved in country of incorporation—Debt owing in foreign currency to customer on current account—Subsequent winding-up in England—Date for conversion of debt into sterling*

Case No. 8. The decision of Wynn-Parry J. in *Re Russian Commercial and Industrial Bank*, [1955] 2 W.L.R. 62, is notable for the light it throws on the anomalous position of the foreign corporation which has been dissolved by the law of its incorporation and is being wound up compulsorily in England as it affects the date to be adopted for the conversion into sterling of the debts of the corporation expressed in foreign currency.

The Bank, which was incorporated in Russia and which also carried on business at an English branch, was dissolved under Russian law in December 1917 or January 1918. The English branch continued for a time to carry on business, but a petition for the compulsory winding-up of the Bank was presented in February 1922, and a compulsory winding-up order was made in October of the same year.

<sup>1</sup> Cmd. 8954; Article 3 (3) of this Convention provides:

'A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant; and, if a ship has been arrested in any one of such jurisdictions or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the court or other appropriate judicial authority of that State, unless the claimant can satisfy the court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.'

<sup>2</sup> The Administration of Justice Bill, which received its second reading in the House of Commons on 13 February 1956; see *Hansard, House of Commons Debates*, vol. 548, No. 95, col. 2098.



The applicant, executor of a customer who had had for many years prior to the winding-up order a current account with the Bank at their London branch amounting to 36,430 roubles, sought to prove in the winding-up for a sum in sterling converted at the rate of exchange current at the date of dissolution of the Bank in Russia. The liquidator contended that the proper date for the conversion was that of the winding-up in England.<sup>1</sup> A summons was taken out by the applicant to determine this question.

Wynn-Parry J. first dealt with the argument that in principle proof in a winding-up for a debt expressed in foreign currency must be for a sum in sterling converted as at the date when the debt became due. Relying on *Re British-American Continental Bank Ltd.*<sup>2</sup> and *Madeleine Vionnet et Cie v. Wills*,<sup>3</sup> he accepted the view that the correct date on which a debt ought to be converted into sterling, for the purpose of ascertaining the amount for which the claimant should be admitted as a creditor in the winding-up, is the date on which the debt became due.<sup>4</sup>

He then turned to the question of determining when the debt became due. As the debt was one owed by a bank to a customer, the debt would normally have become due when the customer demanded payment from the bank at the branch at which the current account was kept.<sup>5</sup> However, this principle could only apply on the assumption of the continued existence of the relationship of banker and customer; if that relationship were terminated, the incidents of the relationship must cease upon the termination. Consequently, as the Bank had been dissolved in December 1917 or January 1918, and as this dissolution entailed the termination of the relationship of banker and customer, any balance belonging to the customer in the hands of the banker became payable at the date of the dissolution.

However, this did not conclude the issue. The present proceedings were for the purpose of determining the sum in sterling for which the applicant's proof in the winding-up of a foreign dissolved corporation could be admitted. As Wynn-Parry J. pointed out, the House of Lords had stated in *Russian and English Bank v. Baring Bros.*<sup>6</sup> that the effect of a compulsory winding-up order in relation to a foreign dissolved corporation is that, for the purposes of the winding-up, 'the dissolved foreign company is to be wound up as though it had not been dissolved, and therefore continued in existence'. How did this principle apply to the present case? Wynn-Parry J. referred to the fact that the Bank had continued to carry on business at the London branch for a considerable time after the dissolution in Russia and stated that, in the winding-up, regard must be had to these post-dissolution transactions. He accordingly concluded as follows:

'For myself, I can see no other logical conclusion than that for all purposes of the liquidation the dissolution of the bank is to be ignored. A customer of the bank to whom money is owing on current account at the date of dissolution can only obtain payment (either in whole or in part) by proving in the winding-up; but if he proves in the winding-up he must accept that the dissolution which, looked at outside the winding-up, was effective to determine the relation of banker and customer, is to be treated by the liquidator, who examines his claim, and the court which may have to pronounce on it, as not having taken place. In other words, he can rely on the dis-

<sup>1</sup> Wynn-Parry J. found that the evidence as to what the rate of exchange was on each of these respective dates was scanty; but he proceeded on the basis that the rate of exchange at the date of dissolution was 360 roubles to the pound and that the rate of exchange at the date of presentation of the winding-up petition was 400,000 roubles to the pound. The effect was that if the applicant succeeded in his contentions, he could prove in the liquidation for just over £100; if the liquidator succeeded, the applicant could only prove for about 2s.

<sup>2</sup> [1922] 2 Ch. 575.

<sup>3</sup> [1940] 1 K.B. 72; noted in this *Year Book*, 21 (1944), p. 216.

<sup>4</sup> For criticism of this principle see Kahn-Freund in *Law Quarterly Review*, vol. 68, pp. 163-7; Mann, *Legal Aspect of Money* (2nd ed.), pp. 318-24, 328-30; Wolff, *Private International Law* (2nd ed.), p. 462.

<sup>5</sup> *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110.

<sup>6</sup> [1936] A.C. 405 at p. 427; noted in this *Year Book*, 18 (1937), p. 222.

solution as having terminated the relation between banker and customer, if he stays outside the winding-up, in which case he will be without remedy; or, on the other hand, he can prove in the liquidation, in which case he must accept the non-recognition by the liquidator and the court of the event which in fact caused the termination of the relationship of banker and customer between the bank and himself.<sup>1</sup>

The correct date for the conversion of the debt into sterling was, therefore, the date of the commencement of the winding-up in England.

The decision in this case is clearly in accordance with established doctrine. Once again, the 'breach-date' rule for conversion into sterling of debts expressed in foreign currency has been affirmed in no uncertain terms; but this was only to be expected, since only the House of Lords is now competent to overthrow the 'breach-date' principle in relation to the conversion of liquidated contractual debts.<sup>2</sup> However, the principal interest in this case lies in the circumstance that Wynn-Parry J. found it possible to ignore the fact of dissolution of the Bank in Russia. Despite the consideration that one learned Judge has characterized the principle of ignoring a foreign dissolution as leading one into a 'maze of metaphysics',<sup>3</sup> it is respectfully submitted that the view taken by Wynn-Parry J. is to be preferred. The winding-up of a dissolved foreign corporation is a highly artificial procedure, but many of the difficulties can be overcome if it is recognized that, for all purposes of the liquidation (including the determination of the date on which a debt expressed in foreign currency should be converted into sterling), the corporation should be treated as if it had not been dissolved.<sup>4</sup>

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<sup>1</sup> [1955] 2 W.L.R. 62 at p. 69.

<sup>2</sup> See the present writer's comments on *Cummings v. London Bullion Co.*, [1952] 1 All E.R. 383, in this *Year Book*, 29 (1952), pp. 482-4.

<sup>3</sup> *Re Banque des Marchands de Moscou*, [1952] 1 All E.R. 1269 at p. 1277, *per* Vaisey J.; noted in this *Year Book*, 29 (1952), pp. 460-1.

<sup>4</sup> To the same effect, see the interesting and comprehensive article by Michael Mann, 'The Dissolved Foreign Corporation', in *Modern Law Review*, 18 (1955), p. 8.



## REVIEWS OF BOOKS

*Académie de Droit International de la Haye: Recueil des Cours*, 1954. Volumes 85 and 86. Paris: Recueil Sirey. 1955. 540 pp. and 691 pp. respectively.

These two volumes contain over one thousand pages of material on a wide field of topics of international law.

The first volume opens with lectures by a South American jurist, Professor Eduardo Jimenez de Arechaga. His subject is the handling of international disputes by the Security Council of the United Nations. Among many other aspects of this somewhat depressing subject he discusses the controversial thesis of Judge Sir Hersch Lauterpacht on the interpretation of Article 38 of the Charter. M. G. S. Maridakis writes on the rules of private international law contained in Articles 4 to 33 of the Greek Civil Code of 1946. He argues persuasively, and on the whole convincingly, that these provisions are in conformity with international comity. His chapter on classification is somewhat disappointing, and it cannot be said that he introduces new ideas on the subject. Indeed, he seems not to have had available some of the relevant literature; for instance, he makes no reference to Sir Eric Beckett's brilliant and thought-provoking article in this *Year Book* (1934), which, in the opinion of the present reviewer, regrettably failed to exercise the influence it deserved. It is true that the article was, and remains, controversial, but it is remarkable that M. Maridakis does not even mention it.

Professor Wortley has contributed lectures on 'The Interaction of Public and Private International Law', a most interesting theme. Perhaps Professor Wortley raises more questions than he answers. One wonders, for instance, whether he has not assumed, rather than demonstrated, that 'rights' in the private international law sense existed for aliens in India and in Mohammedan countries at the time of the French Revolution. The quotation from Seelle (p. 254) that 'international law dominates but does not replace national law', which is approved by Professor Wortley, is the expression of a pious wish rather than a statement of fact. The following passage seems to be in the same vein:

'When international co-operation results in the recognition and protection of human rights there will arise again a body of international law concerned with individuals and cognizable in international and national courts.' (p. 257.)

Nothing in history supports this statement. Why 'again'—since at no time has international law been 'concerned' directly with human rights, and only recently quite indirectly with individuals? However, although one may differ here and there from Professor Wortley's approach, he has performed a valuable service in addressing himself to a subject which will undoubtedly grow in importance as the years go by.

Most interesting, and perhaps the most valuable in this volume from a practical point of view, are the lectures delivered by Captain Mouton of the Royal Netherlands Navy. For many years Captain Mouton has concerned himself with the question of the Continental Shelf, and these lectures are the fruit of many years of study and reflection upon the subject. Well-documented, precise in phrase and thought, and strictly pragmatic in style, they are probably the best critical study of this question that has appeared up to date. It was only fitting that the Institute of International Law should

have recognized his scholarly labour on the Continental Shelf by awarding him the Grotius Prize.

The first volume concludes with a course of lectures by Professor Corbett on the subject of 'The Social Basis of the Law of Nations'. There is something rather evangelical about Professor Corbett's attitude to international law. He says: 'The progress of the United Nations invades what has hitherto been one of the most jealous preserves of sovereignty, namely the relation between government and citizens' (p. 530). Is he speaking of the intention of its founders, the political practice of the United Nations, or the legal position under the Charter? So far as the latter is concerned the basic rule is laid down by Article 2 (7), which prohibits, apart from enforcement action under Chapter VII, any intervention by the United Nations in matters which are essentially within the domestic jurisdiction of States. One cannot escape the feeling that Professor Corbett has attempted to cover too much ground in too short a space. It can scarcely be useful to say, for example, of State succession, that 'the textbooks assume the existence of an international law of State Succession', and then dispose of the subject in half a page of desultory comment. Nor is it other than misleading to suggest that States refuse in this field to 'recognize that they are acting in the domain of law' (p. 515). The examples of Israel, Burma, and Pakistan, not to mention the vast body of earlier practice recorded in Feilchenfeld, tell a different tale.

The second volume begins with M. Chrétien's lectures entitled 'Contribution à l'étude du droit international fiscal actuel'. We should feel indebted to M. Chrétien for bringing us back to this subject which is, on the whole, somewhat neglected by writers on international law. The late Sir John Fischer Williams, who wrote most illuminatingly about it, would, we feel sure, have welcomed this fresh and highly analytical treatment of the subject. Professor Paul de Lapradelle writes on 'Les Fontières de l'Air', a valuable and important study. Dr. Ropke, manifestly influenced by doctrines of free trade, writes on 'Economic Order and International Law'.

In this second volume there can be little doubt that the lectures of Mr. Rosenne are most outstanding. Mr. Rosenne (better known to many readers of this *Year Book* as S. D. Rowson, author of many learned articles on Prize Law and much else, and now Legal Adviser in the Israeli Foreign Ministry) has taken as his subject 'United Nations Treaty Practice'. His intention, he writes, 'is to ascertain to what extent it [the United Nations] has succeeded in adapting the general international law of treaties to its requirements, and to do so despite the heterogeneous character of its own membership'. He commences his study with a consideration of the influence the treaty practice of the League of Nations has had upon that of the United Nations. So far as the present reviewer is aware, Mr. Rosenne is the only writer who has, up to date, examined this question in detail, and his observations on the subject are both well documented and acute. He notes that whereas, under the League of Nations, the Council acted as an executive organ in relation to the Secretariat on treaty matters, the powers of the Security Council with regard to treaties are limited, and in practice the General Assembly has not only acted as a policy-making body for many aspects of treaty law (as, for instance, reservations, interpretation and revision of treaties), but even as a drafting body for major international conventions. Doubtless the political impotence of the Security Council in the past decade largely accounts for this shift of emphasis. Mr. Rosenne proceeds to consider the scope of the term 'treaty' for the purposes of the obligation to register international agreements under Article 102 of the Charter, and has here succinctly recorded everything that can usefully be said on that question. The treaty-making power of international organizations, and especially their implied treaty-making power, is discussed. This leads to a consideration of the reasons why the United Nations 'as



been so prolific in the output of treaties. Mr. Rosenne suggests two reasons. One is the 'dynamic conception of the place of the United Nations in international affairs held by the Secretariat, and particularly by the two Secretaries-General themselves; and partly in the physiognomical characteristics of the Organization'. He means by the latter the fact that the resolutions of the principal organs of the United Nations do not in themselves constitute legally binding obligations and are mainly persuasive in character; in consequence their implementation requires in most cases the intervention of a treaty. A long chapter entitled 'Treaties under United Nations Auspices' occupies the greater bulk of these able lectures. He observes, it is believed with some justice, that in the course of time the fact that a treaty has been made under United Nations auspices may lead to a profound reconstruction of the whole theory of the international law of treaties, and in particular of the doctrine *pacta tertiis nec nocent nec prosunt*. This theme he develops most interestingly, linking it up with the legal *locus standi* of the United Nations and the Advisory Opinion of the Court in the *Reservations* case, the case on the *Interpretation of the Peace Treaties with Bulgaria*, &c., and the Judgment of the Court in the *Corfu Channel* case.

It is not possible in this brief review to do justice to the valuable contribution made by Mr. Rosenne to the study of the implications of United Nations treaty practice, but he undoubtedly makes it clear that much is going on quietly but progressively which is significantly influencing the customary law of treaties. We may content ourselves with his general summary of the distinctive features of United Nations treaty practice in relation to the classic law of treaties. 'First, the general tendency towards simplification in questions of form, with correspondingly increased emphasis on matters of substance, has continued. Second, notions which were germinating, unseen, in the practice of the League of Nations have budded forth. Third, there have occurred some significant new developments, for which no earlier examples exist.' These new developments are those connected with the treaty-making power of the United Nations and the Specialized Agencies.

The general course on the principles of international law is given by Professor Charles de Visscher. Infused by a very positive and definite attitude towards international law, readable in the highest degree like everything he writes, the lectures expound the rules of international law on the same general lines as his remarkable book *Théories et réalités en droit international public* (reviewed at length in last year's *Year Book*). The volume concludes with a course of lectures by M. Castanon on 'Les Problèmes Coloniaux et les Classiques Espagnols du droit des gens', a learned contribution to the history of international law, and, in particular, to the study of the role played by the scholastic theologians in its development.

J. M. J.

*Annual Digest and Reports of Public International Law Cases*, 1949. Edited by H. LAUTERPACHT. London: Butterworth & Co. (Publishers), Ltd. 1955. xxiv+613 pp. £3. 10s. od.

This is the first volume of the *Annual Digest* which has appeared since its Editor relinquished the Whewell professorship and assumed judicial office. It is good to know that the latter does not preclude him from continuing to accept responsibility for a work which owes so much to his skill and enthusiasm, without which the international lawyer's equipment would be severely impoverished, and of the importance of which the present volume again bears witness.

The new volume of the *Annual Digest* contains, of course, the reports of many cases

which are already well known to the student of international law; this applies, in particular, to the decisions of the International Court of Justice in the *Corfu Channel* case and the case relating to *Reparation for Injuries Suffered in the Service of the United Nations* and to many of the English and American cases included in the volume. There are, however, several decisions reported to which the reader's attention should be specially drawn. Among them the unpublished Award on the *Constitution of UNESCO* (p. 331) holds pride of place. The decisions of Military and Occupation Courts sitting in Germany and of certain special tribunals established in Holland will fortify the impression that these Courts have made a substantial contribution to the law of war—an assertion which the present reviewer would not venture to repeat were it not for the fact that a similar comment made by him in an earlier volume of this *Year Book* seems to have caused surprise to a contributor to the *Law Journal*. Those who remember the anxiety caused to Dutch lawyers by the issues which arose in *Amand's* case, [1941] 2 K.B. 239, [1942] 1 K.B. 445, will note with satisfaction two Dutch decisions (pp. 429–31) upholding the validity of the legislation enacted by the exiled Dutch Government in London. The year 1949 saw the beginning of the long line of decisions on the international status of Germany (see pp. 37, 267). The Editor did well to include in the present volume a decision rendered by the French Cour de Cassation in 1950 (p. 224) which, in effect, overruled a decision of 1949 (p. 225) and held that German nationality had not been re-imposed on stateless refugees of German origin. Case No. 1111 is a somewhat disappointing Italian decision on the law of double nationality: a person who was a citizen of both Italy and the United States of America and resident in the latter country was held not to be a United Nations national within the meaning of certain provisions of the Treaty of Peace of 1947. On the other hand, it is satisfactory to note the firmness with which the Swiss Federal Tribunal asserts (p. 281) that the acquisition of diplomatic immunity depends on prior *agrément*. Another important pronouncement comes from a Dutch court, which said (p. 529) that

'as far as the applicability of the laws of war is concerned no difference is made between a lawful and an unlawful war, nor as a consequence between a lawful and an unlawful occupant'.

A matter of great interest, though perhaps not of international law, is dealt with in a decision of the United States Court of Appeals, 9th Circuit, where the measures taken in 1942 against United States citizens of Japanese descent were denounced with a vigour unusual for so high a tribunal (p. 204): the Court spoke of the 'unnecessarily cruel and inhuman treatment of these citizens . . . in applying to them the Nazi-like doctrine on inherited racial enmity'. In this connexion it may be pointed out, however, that the United States of America seems to have produced comparatively few international law cases during 1949; in a number of instances it must, indeed, be asked whether the American cases (such as Nos. 49, 50, 55, 59, 67, 74) have sufficient bearing on public international law to warrant a report in the *Annual Digest*. Another point which it is suggested that the American contributor should take into account for future volumes is the need to indicate the names of the Judges in the American cases; in assessing the significance of a decision rendered by a common law tribunal the identity of the Judge is clearly an important point to be considered.

F. A. MANN

*Fontes Juris Gentium*. Decisions of German Superior Courts, 1945–9. Cologne/Berlin: CARL HEYMANNS VERLAG. 1956. xx+250 pp.

Before the Second World War the Institute for Foreign Public Law and Public



International Law, then in Berlin, commenced the publication of a useful collection of materials relating to international law. Of the nine volumes which appeared, three contained decisions of the Hague Courts, while five others reported the diplomatic correspondence of European States between 1856 and 1878, and one volume was devoted to the decisions rendered by the German Supreme Court between 1879 and 1929. All these volumes are out of print, but it is good to know that the Institute, now in Heidelberg, has recently resumed the last-mentioned series by publishing a volume of decisions which were given between 1945 and 1949 by German superior courts on questions of international law. It was a period when Germany was without a Supreme Court, but when, as a result of the war and the occupation, German judges were faced with many difficult and interesting problems. It is satisfactory that the collection does not reproduce the decisions of inferior German courts: everyone familiar with the German legal system must agree that their persuasive authority is less than that of English county courts, and in the face of a groundless objection by Domke, *American-German Private International Law* (1956), p. 54, it must be maintained that, irrespective of the attitude of compilers and advocates, they should be ignored by courts or scholars concerned with German practice. Even the decisions of superior courts reported in the present volume should be treated with circumspection, for in many instances they have lost their value as a result of the practice which was developed by the six German Supreme Courts created in and after 1949; indeed, it is perhaps a disadvantage of the present volume that it does not contain any notes referring to later cases decided by those Courts and intended to be included in the forthcoming volume covering the years 1949-55.

In point of form the present volume follows the lines of its predecessors. The first part contains, under various headings, extracts from the decisions, viz. such statements of principle as they express; in some instances these are only *obiter dicta*, and in other cases they are a summary rather than a precise reproduction of the words used by the Court, so that they must be treated with some care. Each such statement is printed in German with English and French translations and a reference to the decision in which it occurs. The second part contains the German text of the decisions abstracted in the first part. Since there is an Index in all three languages, this arrangement makes the book eminently useful to the non-German student. It is a welcome addition to the international lawyer's technical equipment.

F. A. MANN

*Grotius Society Transactions for the Year 1954*. Volume 40. London: The Grotius Society. 1955. xxxi+191 pp. 25s.

Of the seven papers read to the Grotius Society during the year 1954, only six are printed in this volume of its *Transactions*. The seventh paper was read by Dr. V. R. Idelson, Q.C., the Society's Vice-President, who unfortunately died before he was able to complete the paper for publication.

At the Society's International Law Conference, 1954, a timely paper on 'Review of the Charter of the United Nations' was read by Judge Dr. N. V. Boeg, who is Chairman of the United Nations Charter Committee of the International Law Association. Judge Boeg points out that the English text of Article 109 of the Charter, which speaks of 'reviewing' the Charter, is at variance with the Chinese, French, Russian, and Spanish texts (all of which, by Article 111, are equally authentic) which speak of 'revision' of the Charter. However, Judge Boeg thinks that it was the understanding at San Francisco that a General Conference should be called where 'the various countries should

have an opportunity of expressing their views both on the way in which the charter has so far been interpreted and has been working and also with regard to the best manner in which they consider that the charter could be altered and amended'. Changes in constitutions, he argues, should be avoided as far as possible: it is usually possible, and perhaps in this case would be sufficient, to adapt an existing constitution to changing conditions. For example, there is the difficulty which arises under Article 27, paragraphs 2 and 3, the so-called double veto. Dr. Boeg suggests that the Security Council might decide what constitutes a procedural matter, and perhaps incorporate the definition in the Charter itself.

Conflict of laws forms the subject of three papers in this volume. The first is by Dr. F. A. Mann and is entitled 'Prerogative Rights of Foreign States and the Conflict of Laws'. It deals with the well-known rule that the courts of one country will not apply or 'enforce' certain of the laws of another country which are of a public-law character, that is to say, penal, fiscal, 'political', or monetary laws; and Dr. Mann points out that 'there is no evidence that such relevant foreign law as is public law is in fact being disregarded in any Continental country, nor is there any good reason why it should be disregarded'. The same applies in England. Dr. Mann shows that despite the dictum of Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341, 343, that 'no country ever takes notice of the revenue laws of another', and the dictum of Bullen J. in *Folliott v. Ogden* (1789), 3 T.R. 726, 733, that 'it is a general principle that the penal laws of one country cannot be taken notice of in another', the practice of the English courts is not in fact opposed to taking notice of the fiscal or penal laws of other countries. At the same time, some foreign laws are by their nature incapable of enforcement in England; this is particularly so when it is a foreign State or one of its instrumentalities that asserts before an English court the public authority conferred upon it by its own penal and revenue laws. Lord Watson in the Privy Council case of *Huntington v. Attrill*, [1893] A.C. 150, 156, has referred to actions which 'by the law of nations are exclusively assigned to their domestic forum'. Dr. Mann submits that such actions are based upon the *jus imperii* of a State, the reason being that the exercise of a State's imperium ends at the State's frontiers. Generally, public international law offers a safer guide than public policy, convenience, or similar conceptions, to the court's attitude to the class of actions under discussion, actions arising out of what Dr. Mann calls 'prerogative rights'. The learned writer examines a number of cases, from *Emperor of Austria v. Day and Kossuth* (1861), 3 De G. F. & J. 217, to *Bank voor Handel en Scheepvaart v. Slatford*, [1954] A.C. 584, to show how far English courts have followed, or departed from, the international law rule against the enforcement of foreign prerogative rights and makes a number of attractive submissions on the effect and extent of the principle. The whole of Dr. Mann's thesis is directed to excluding considerations of public policy from the reasons which should move an English court to reject the claim of a foreign Government based on prerogative rights. But it has always been the guiding principle of our courts that they reserve the right to refuse to enforce laws based on the whims, the rapacity, or the oppressive demands of a foreign State.

The second paper on conflict of laws is by Mr. Commissioner Latcy, M.B.E., Q.C., and deals with 'Conflicts of Jurisdiction in Divorce and Nullity of Marriage'—the fourth paper on this vexed question to be read since the war to the Grotius Society. Mr. Latcy confines himself mainly to recent developments, noting that the number of cases of judicial divorce is increasing in all countries where it is allowed; and that with the increased facilities for transmigration the problem will become graver and more weighty. He reviews the effect of the Matrimonial Causes Act, 1950, which permitted wives whose husbands were domiciled abroad, but who had been ordinarily resident in



England for three years, to sue for divorce in England, observing that this change of basis of jurisdiction, although it affects wives only, weakens the case for non-recognition of foreign decrees based on residence alone. Mr. Latey then glances at such topics as domicile or residence as the basis of jurisdiction abroad; the confusion in the United States as regards mutual recognition of jurisdiction; the definition of domicile; and the International Law Association's draft Prague Convention of 1947, for which he confesses a distinct preference.

Thirdly, there is the paper read at the Manchester meeting of the Society by Professor B. A. Wortley, O.B.E., LL.D., on 'Proposed Changes in the Law of Domicile, with reference to the Wynn-Parry Report'—which contains a draft code which not only sets out the existing law but incorporates changes necessary for the acceptance of the Hague Draft Convention of 1951. Professor Wortley demonstrates that the common law conception of domicile is not native: it comes from Roman Law via the Canon Law: a man's *domicilium* in a diocese, established by habitual residence there, gave jurisdiction to the Ordinary of his diocese. The continental conception of domicile is that of a principal dwelling-place; and it was as a preliminary to solving the problem of equating the English and Continental systems that the Lord Chancellor asked his Private International Law Committee to 'consider what alterations are desirable in the law relating to domicile'. Professor Wortley reviews the well-known and important decisions on the nature of the residence required for domicile in *Winans v. Attorney-General*, [1904] A.C. 287, and *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588, and points out the importance of this question to those thousands of refugees in this country who 'only hope to return home when the Government that persecuted them changes its policy, and very often its legal system'. Professor Wortley thinks that to debar them from obtaining a domicile here 'seems rather the wrong presumption to-day'. But they do retain their hope of return to their own country, and if tomorrow they trooped back after a revolution which permitted them to do so—and who will guarantee its impossibility?—the presumption would be vindicated; any departure from it might produce notable anomalies. On the proposed abolition of the doctrine of revival of the domicile of origin, Professor Wortley shows how the current doctrine has departed from the Roman Law and Canon Law conceptions, and how the solution adopted by the Wynn-Parry Report—that a domicile, whether of origin or of choice, shall continue until another domicile is acquired—would bring English law into line with American law and with the opinions of modern English jurists such as Martin Wolff and Cheshire.

'The Codification of the Law of Diplomatic Immunity' is the subject of a paper by Mr. E. Lauterpacht, M.A., LL.B., who takes as his text the Resolution of 5 December 1952 of the General Assembly requesting the International Law Commission to undertake the codification of the topic 'diplomatic intercourse and immunities'. Although it may be several years before the Commission can give the subject even preliminary consideration, the Resolution recognizes that the law of diplomatic immunity is a fit subject of codification because it does not involve political considerations or the vital interests of any group of States. The task of the Commission, however, does involve, besides mere codification, the development of the law where it is defective or where uniformity of practice is lacking, as, for example, such questions as the immunity of servants of diplomatic persons and waiver of immunity. Mr. Lauterpacht points out that protests between States have been concerned with breaches of privilege arising from diversity in the law applicable, not with argument on that law. The Commission must, moreover, take into account modern developments regarding the immunity of States, of Governments, and of foreign armed forces. Exemption from legal process is not congenial to the climate of the modern State and the principle of immunity is in the

decline. The now acceptable view is that the sole purpose of diplomatic immunity is the safeguarding of the unimpeded fulfilment of the diplomatic mission. Abuse of privilege will not, and in law need not, be tolerated. In England the fulfilment by a diplomatic person of his contractual obligations, or the payment of reparation for tortious wrongs, is ensured by the intervention of the Foreign Office with the offender's Mission, with the ultimate sanction of his being declared *persona non grata*. Mr. Lauterpacht considers that the codification of the law of diplomatic immunity is realizable, provided that some States are willing to change their law. He also contends that such codification must leave out of account the needs of 'the exceptional conditions of war or of situations approaching it'—precisely those occasions when, one would have thought, clarity and certainty in the law was most important. He considers that future development of the law of diplomatic immunity will eschew the suggestion that it should be based on reciprocity—which he rightly calls 'a makeshift', productive of uncertainty and a denial of the existence of a rule of law.

In his paper on 'The Legal Regulation of Modern Warfare', Mr. N. C. W. Dunbar, LL.M., seeks to define what is meant by the principles of humanity which the Hague Conventions attempted to apply to warfare. He pleads for a Declaration of Human Rights applicable in time of war and for this country to take the initiative in convening an international conference in London for the purpose of drawing up a charter of fundamental and minimum human rights which the nations of the world are prepared to honour in time of war.

Professor E. C. Wade, LL.D., expounds the *Minquiers and Ecrehous* case, the Judgment in which was notable in several respects. In it, the International Court of Justice accepted a title established according to the rules of municipal law, that is, Norman feudal law, gave a unanimous Judgment, refused to decide disputed points of history, and referred to no international precedents. Professor Wade complains that the Court failed to decide what should be the nature of the critical date for crystallizing the issue in inter-State claims to territory and missed an opportunity of contributing a precedent to international law on the working of the intertemporal law doctrine; but it is no part of the function of a court of justice to go beyond its task of deciding the question laid before it by the parties to a *lis*, even to make a constructive contribution to public international law.

In his paper on 'The International Civil Servant, His Employer and His State', Mr. L. C. Green, LL.B., first attempts to define what is meant by the international civil service and compares Article 7 of the Covenant of the League of Nations with Articles 100 and 105 of the Charter (which govern the duties and the immunities of the Secretary-General and his staff). He deals at some length with the Staff Regulations of the United Nations and in particular the *Leff* case of 1954, and devotes three long sections headed respectively 'Protecting the International Civil Servant', 'The Advisory Opinion of the World Court', and 'The I.L.O. Administrative Tribunal' to review, and to criticism of the functions, the awards, and the character of the Administrative Tribunal of the United Nations and that of the International Labour Organization. Mr. Green arrives at the conclusion that 'it is the duty of the international civil servant to ensure in his conduct that he does nothing to bring suspicion upon his loyalty to his State or his employer'; and while he is careful not to express approval of the custom of States to demand disciplinary measures to be taken against their nationals who are officials of international bodies, he appears to have no objection to the type of case in which it is alleged that an official has engaged in subversive activities 'against his own or any other State' before the official assumed service with the organization 'and concerning which he should not, therefore, be able in any circumstances to claim the protection of



his immunity as an international civil servant'. The implications of this last dictum are not such as everyone will view with equanimity.

The standard of production of this volume of the *Transactions* is below what has become customary. The footnotes in particular (and especially those to Professor Wortley's paper) are marked by irritating inaccuracies which detract from the pleasure of reading a number of instructive, interesting, and important papers.

A. B. LYONS

*Comunicazioni e Studi*. Volume VI. ROBERTO AGO, General Editor. Milan: A. Giuffr . 1954. 566 pp. Lire 3,500.

The sixth volume of this series follows the pattern set by its predecessors. Articles of a theoretical character on topics of public and private international law, surveys of the practice of Italian courts in these fields and of the International Court of Justice during the year under review, and very extensive book reviews make up its content. Professor A. Herrero Rubio gives an account of the new Spanish Nationality Law of 1954. This Act brings Spanish law more closely into line with modern developments, but the new measures are cautious, and are much influenced by the special interests of the Spanish State and its population. Professor Giuliano discusses the well-known problem of the State, its territory and territorial sovereignty in a system of international law, with special reference to the question whether sovereignty shows a dual aspect in being a right of a proprietary character over territory, on the one hand, and a right to exclude the remaining States, on the other hand. The author correctly rejects this division, which introduces an artificial dualism and distorts a uniform notion on grounds drawn from patrimonial concepts. In so doing he adds a useful corrective to certain recent trends in Italian doctrinal writings.

Professor Pau, in a lengthy contribution, discusses the place of domestic law in the theory of the sources of international law. This is a question which every international lawyer must face at some time, and it is not surprising that the author's diligent researches and intricate speculations have led him to conclusions which are an expression of faith rather than discoveries. His thesis that these principles are common to international and to municipal law neither in virtue of the former nor of the latter, but in virtue of their rational character as expressed in the legal conscience of States, appears to combine elements drawn from natural law and from sociological doctrines.

Dr. Marazzi discusses the position of N.A.T.O. in relation to the jurisdiction of its member States. This article, which makes full use of the documents and of the international literature, provides a valuable guide to a new and intricate subject.

Professor Ziccardi examines the characterization of rules of jurisdiction in private international law. This problem was first brought to the notice of English lawyers by Professor Graveson in this *Year Book*, 28 (1951), p. 273, at p. 283. Professor Ziccardi treats the same topic from the angle of Italian law, but its substance is more or less the same. In this sphere characterization is concerned, in part, with claims arising from certain types of legal relationship, partly with rights in certain objects, and partly with concepts which normally operate as connecting factors. His conclusion that the claim in the abstract, and not its validity in the concrete situation, must form the basis of characterization will be readily accepted by common lawyers, where this process of characterization is superseding that which relies on the *lex fori*, not only for the purpose of characterizing rules of jurisdiction.

Dr. Migliazza's detailed and competent study of the form of testamentary dispositions in private international law succeeds in making the point that the form of such

dispositions must be distinguished from their evidentiary character, and that different laws must determine these two separate aspects. English lawyers, who have had to struggle with provisions such as those embodied in the Statute of Frauds and the Limitation Act, are familiar with this division of functions; in the law of wills, however, the absence of public wills has prevented this division from becoming a practical reality.

The survey of the practice of the International Court of Justice during the year, compiled by Dr. Migliazza, maintains the high standard set in previous volumes. Dr. Fabozzi writes with commendable and exceptional lucidity on the practice of Italian courts in matters of public international law during the year under review, and Dr. Zannini provides a similar useful survey of cases touching private international law. The section dealing with reviews of books and periodicals, extending over one hundred pages, deserves commendation for its informative and critical content.

K. LIPSTEIN

*Le Vatican et la seconde guerre mondiale: Action doctrinale et diplomatique en faveur de la paix.* By PAUL DUCLOS. Paris: Éditions A. Pédone. 1955. 254 pp.

This book, more for the student of international affairs than for the lawyer, offers a 'provisional synthesis' ('provisional', because many archives, notably those of the Vatican, remain impenetrable) of the activities and pronouncements of the Holy See relating to the war of 1939-45. Dr. Duclos's approach is somewhat uncritical, but even those who do not share his *parti pris* may gain from him a more sympathetic appreciation of the difficulties and delicacies of a situation where an ill-timed condemnation might simply provoke the wrongdoer to persecution of victims beyond the reach of material succour.

Two chapters are of more specifically legal interest. One, resting largely on the published work of Gonella, expounds the Catholic conception of international order based on natural international law, a natural community of nations, and the moral life of such a community. The other deals with recent developments in the doctrine of *bellum justum*. Dr. Duclos suggests that Pius XII in his pronouncements, and particularly through his application of the notion of *bonum commune*, has made a greater contribution to international law than any of his recent predecessors.

There is also material for legal speculation in the account of the Vatican's noble work in sheltering refugees. The lawyer, seeking analogies with his rules of asylum, will doubtless think of possible distinctions according to the status of the place of refuge (Vatican territory, or ecclesiastical buildings in Rome endowed with diplomatic immunity, or churches and convents with no claim to immunity beyond their sacred character) or according to the character of the refugees (victims of racial persecution, or escaped hostages, or escaped prisoners of war, or Italian deserters, or anti-fascist Italian civilians, or, as in one instance, partisan leaders who—without the knowledge of the Vatican—set up a wireless station in their place of refuge). The charity of the Vatican took little account of such distinctions.

A. H. CAMPBELL

*The Conflict of Laws.* By R. H. GRAVESON. 3rd edition. 1955. London. Sweet & Maxwell. xxxiv + 506 pp. 40s.

In the second edition of his now well-established textbook Professor Graveson



sought to state the law as it stood in June 1952. In this third and new edition the author has sought to state the law as it stood in November 1955. The quantity of the new material which has been incorporated is ample justification for the appearance of another edition after less than 3½ years; it also provides a striking demonstration of the fertility of contemporary English private international law. The third edition is fifty pages longer than its immediate predecessor, and that it is not larger still is due very largely to the skill with which the author has been able to effect concise incorporation of the additional material. He has mentioned in the text a score of new cases, and has introduced references to some three dozen more. There is some discussion of the Private International Law Committee's Report on domicile. There is mention of new contributions of significance to the literature of the subject.

In addition, the author has made a few changes of a less routine nature. He has introduced a section on the recognition of foreign acts of adoption, and a section on the air law of torts. He discusses briefly the jurisdictional aspects of quasi-contract (p. 310); he also makes fleeting reference (p. 206) to the recent decision of the House of Lords in *Arab Bank Ltd. v. Barclays Bank*,<sup>1</sup> which was an action for money had and received. This is one of the dark places of the conflict of laws where authority is little. Professor Graveson's venture into it is most welcome; one may be permitted to regret, however, that he has not indulged in longer treatment and given his readers the benefit of an elaboration of his own views. The section on public policy is considerably expanded. An interesting new *excursus* sets out the text of the Wills Amendment Act, 1954, of Ontario, which provokes comparison with the English Wills Act, 1861.

The qualities of the earlier editions (particularly the second) of Professor Graveson's work are well known. It requires the attention of any serious student of the conflict of laws. Professor Graveson has fully reproduced these qualities in his latest revision.

P. B. CARTER

*The European Coal and Steel Community. An Experiment in Supranationalism.* By HENRY L. MASON. The Hague: Martinus Nijhoff. 1955. xii+153 pp. 8.50 Gldrs.

In this book, Mr. Mason has undertaken to examine the process of ratification of the Treaty of the Coal and Steel Community, to analyse the legal structure of the Community, and to describe the Community's operations during 1952-4. He has searched contemporary newspapers and periodicals with thoroughness and gives us a great deal of useful political information about the formation and work of the Community. Unfortunately, however, he fails sufficiently to discuss issues, explore problems, and draw conclusions from the events he describes. He describes (pp. 75-87), for example, the action of the Community's High Authority in implementing the cartel and monopoly provisions of the Treaty (Articles 65-67) and the reaction to these measures by the politicians and industrialists in the member countries. But, although the cartel and monopoly problem has been one of the most troublesome for the High Authority, Mr. Mason does not explore the questions that the High Authority will necessarily encounter in administering the provisions of the Treaty. What type of economic system is implicit in the Treaty? What meaning can and should be ascribed to the phrase 'normal operation of competition within the common market' as used in Article 65? Is the concept embodied in that phrase a workable one in the political, economic, and social environment of the six member countries? Are the actions that the High Authority has taken in reference to cartels and monopolies the ones it should have

<sup>1</sup> [1954] A.C. 495; noted in this *Year Book*, 1954, pp. 467-8.

taken? What is the present state of concentration and cartelization in the coal and steel industries in the six member countries? Are the cartel and monopoly provisions, in so far as they apply to the coal industry, workable in isolation, i.e., without other sources of energy (oil, electricity, the atom) being subject to similar regulation? What are the potential effects of, and what is the High Authority's jurisdiction over, cartel ties between industries within the Community and companies in other countries? Such questions are not discussed.

The author is equally reticent about exploring political questions. Although he identifies the sources of support for European integration in the political parties of the member countries, he does not ask why some parties support and others oppose federation, or why there is a split within certain parties. The fact that the Catholic parties in all six member countries have been virtually unanimous in their support of European integration has political implications that seem worth investigating. Similarly, the conflict within the ranks of the Socialist parties needs greater explanation. It would also be interesting to inquire into the bases of the political support for ratification of the Coal and Steel Community Treaty in West Germany: was that support the result of a European attitude, of a belief in the virtues and necessity of integration, or was it based on a shrewd political calculation that only by joining the Community could Germany put its steel plants into full production and thereby acquire the industrial strength and military potential that is necessary if they are to bargain successfully with the Soviets for the reunification of the German nation? Another problem, directly related to Mr. Mason's sub-title, is the extent to which the actions of the officials of the Community have reflected a European rather than a national attitude. Finally, the question may be asked whether the fact that few, if any, decisions of the High Authority have been taken without the unanimous support and approval of the Governments of the member nations is a mere coincidence, or is an indication of an unexpressed, political, limitation on the power of the Community.

In describing the 'Operations 1952-1954' of an organization whose concerns are primarily economic, it is surprising that there is a complete dearth of economic information. The structure and volume of production and distribution of coal and steel products during the years 1952-4 as compared with earlier years is not charted. The significantly large increase in the amount of steel products traded between member countries is not mentioned. Movements in wages and prices, as well as the mobility of labour, are similarly ignored.

The analysis of the formal legal structure is clearly written and draws the picture well, but it adds little to the descriptions previously available in English (such as Bebr's 'The European Coal and Steel Community: A Political and Legal Innovation', in *Yale Law Journal*, 63 (1953), 1; Goormaghtigh's 'European Coal and Steel Community', in *International Conciliation*, No. 503; Vernon's 'The Schuman Plan', in *American Journal of International Law*, 47 (1953), p. 183; and Valentine, *The Court of Justice of the European Coal and Steel Community* (1954)). The most interesting section, on the 'Nature of Supranational Organization' (pp. 121-34), leaves much to be desired. The discussion is centred on the question whether the Community is a kind of federal government, an 'international organization', or something unique (i.e. 'supranational'). The opinions of a number of scholars on these questions are summarized and quoted. Mr. Mason does not criticize these opinions, although many of them, especially those on the nature of federalism, are inaccurate. As to the latter, he does briefly state (p. 125) that they are inconsistent with the definition of federalism in the best available work (Whcare's *Federal Government*) on the subject: 'a form of government in which sovereignty or political power is divided between the central and local governments, so that



each of them within its own sphere is independent of the other.' Discussing the position of the Community in relation to Professor Wheare's definition, Mr. Mason expresses the opinion: 'Although some political powers have in effect been *apportioned* between the [Community] and the member states, it cannot be said that "sovereignty" or "political power" has been *divided*!' (p. 125; italics added). In addition, he asserts that the 'Community's organs . . . are not fully independent', but he does not demonstrate in what respects the Community's operative organs, the High Authority and the Court, fail to meet Professor Wheare's test of independence. The author concludes that the Community is a 'legal institution *sui generis*', yet the distinctive characteristics of the Community's organization and the 'prerequisites of supranational organization' that he itemizes (pp. 126-7) are equally descriptive of successful federalism. Indeed, the Community is a federal type of governmental organization. The fact that, unlike other federal Governments, it does not have control over foreign affairs or defence but is limited to jurisdiction over a particular field of economic activity, is irrelevant for purposes of formal classification.

In a concluding section, the author states his opinion that the Community can 'survive alone' (i.e. without the European Defence Community) if it is free from major economic depressions and there are not actively hostile Governments in France and Germany. Just as important as the question whether the Community can 'survive' is the question whether it can 'succeed'. Since the establishment of a competitive 'common market' is the *raison d'être* of the Community, the ability of the High Authority to curtail and abolish monopoly and restrictive practices has an obvious relation to the Community's prospects of success. The Community's restricted jurisdiction (to coal and steel), the existence of independent fiscal, monetary, and taxation systems, and a host of other economic problems also bear on the question whether it can succeed. But none of these important matters is discussed.

ALAN W. FORD

*Die Sowjetische Zwölfmeilenzone in der Ostsee und die Freiheit des Meeres.*  
By HANS-ALBERT REINKEMEYER. Cologne/Berlin: Carl Heymanns Verlag.  
1955. 175 pp.

This is the thirtieth volume to appear in the series of studies, sponsored by the Max-Planck-Institut and edited by Carl Bilfinger, entitled 'Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht'. The present work is a temperate, scholarly, and closely argued rebuttal of the recently renewed Soviet claims to territorial waters in the Baltic Sea extending to 12 nautical miles from the shore. The author's thesis is that, although there are no universally accepted principles governing the extent of territorial waters, the power of action of every littoral State is restricted by its duty to observe the principle of the freedom of the seas. Since the Baltic is an 'open' sea (here the political arguments to the contrary put forward by the Soviet Union are convincingly dealt with at pp. 110 ff.) it must necessarily follow that the Soviet claims in their present form do assert sovereign rights over substantial areas of the high seas and therefore have no foundation under international law.

The principal problems, relating to the doctrine of the freedom of the seas and the precedents for the limitation of territorial waters in the area in question, are clearly presented in their historical perspective (pp. 40-91, 134-51) and with a wealth of authority. There is also a concise review of the impact of the 'continental shelf' theories upon the central doctrine (pp. 92-109) which gives due prominence to the valuable work done in recent years by the International Law Commission. Less successful, perhaps, is the

author's brief treatment (pp. 152-7) of the Soviet arguments which allege that their claims are rendered necessary by reasons of State security, that these 'territorial waters' in fact represent a type of contiguous zone. Although one may agree with the conclusion that such a 'safety-zone' (*Sicherheitsanschlußzone*) should be rejected, a closer study of developments since, for example, the publication of the Harvard Research Draft on the Law of Territorial Waters in 1929 would have been welcome. Since the Judgment of the International Court of Justice in the *Fisheries* case, it has become apparent that one avenue of approach towards a solution of the vexed question of territorial waters may well be found within the framework of the theory of 'contiguous zones'. Protests by Sweden and Denmark, together with a refusal by the German Federal Republic to recognize these claims, seem only to have caused the Soviet attitude to harden, since, in a reply, dated 24 August 1951, to a Swedish Note on the subject, it was stated that '... the Government of the Soviet Union sees no reason to refer to the International Court of Justice a question which falls entirely within the competence of the legislative organ of the Soviet Union'.

All in all, however, this is a sound and well-documented work, which maintains the high standard already set by the series. A final word of praise must be given to the useful and comprehensive bibliography which covers the relevant State papers and juristic publications to the close of 1953.

K. R. SIMMONDS

*La Souveraineté des États.* By TAUNO SUONTAUSTA. Helsinki. 1955. xiii + 124 pp. 1,000 Finnish marks.

This monograph is the second to appear in the 'Ius Finlandiae' series (published under the auspices of the Association of Finnish Lawyers) and is here translated from the original by Arvid Enckell. It is designed as a brief survey of some of the more important juridical principles that have become attached during the past three centuries to the notion of 'State sovereignty'; this is a difficult project and the author is to be congratulated on his successful presentation of such a complex and controversial subject within the framework of five chapters and less than 120 pages.

At the outset Dr. Suontausta asserts that the primacy of international law is established on a basis of territorial loyalties; that it is quite possible for a true 'societas gentium' to exist independently of divergent social, economic, and political municipal systems. His thesis is that international law will manifest itself through international discord. In this respect, as throughout the work, his view of Soviet legal theory is of interest; his claim that it is compounded of positivism together with individualism seems to find support in recent events.

Perhaps the most valuable part of the work is the discussion, in the fourth chapter, of fundamental sovereign rights, recognition, and 'domestic jurisdiction'. Rights of equality, of self-preservation, of independence, of international commerce, and of 'mutual respect' (pp. 51-65) are all examined in their contemporary meaning and are interpreted, as also is the exceptional provision contained in Article 2 (7) of the United Nations Charter, as reflections of national sovereignty. Dr. Suontausta shows himself to be a convinced adherent of the so-called 'declaratory' theory of recognition and is prepared to go farther than many authorities (*vide* Kelsen, *The General Theory of Law and the State*, pp. 228 et seq.) in extending the legal consequences of such a 'colourless statement of fact' (p. 79) even to the recognition of governments. Great emphasis is placed on the irrevocable and unconditional character of recognition, and this section is concluded with a persuasive and reasoned defence of the principle of non-recognition.



The final chapter is concerned with outlining some new factors which are tending to weaken the complete territorial sovereignty of many States. The development of the Monroe doctrine, leading to the Pan-American Union, the Bogotá Pact of 1948, and the present Organization of American States, is used as an illustration of one such factor: others discussed include N.A.T.O., the Council of Europe, and the European Iron and Steel Community. These 'regional arrangements' are examined critically, but, unfortunately, no opinions are advanced on the problems that they themselves set in motion.

The author's reluctance to draw positive conclusions from a most useful survey is the great weakness of the book. Yet there are many virtues; the text is often stimulating and is supported by carefully selected footnotes and a good bibliography. The work as a whole fulfils its function in the series admirably, for references to questions of international law in which Finland has been closely concerned bring fresh light to many problems discussed in the text. Amongst these may be mentioned the Advisory Opinion of the Permanent Court on *Eastern Carelia*, the Porkkala 'bailment', the Åland Islands negotiations, and the Russian Peace Treaty of 1947. The emergence of Finland as an independent nation in 1917 from its position as an autonomous Grand Duchy of the Russian Empire also affords a theme that is frequently enlarged upon and, indeed, lies at the root of the writer's attitude to his subject.

K. R. SIMMONDS

*Private International Law.* By J. A. C. THOMAS. London: Hutchinson's University Library. 1955. 174 pp. 8s. 6d.

In his preface the author writes: 'This book aims to present an outline of the rules and principles of private international law in England. . . . The views here expressed are those which to me seem most consistent with the present state of the authorities. If the book assists the prospective barrister or solicitor in preparing for his examinations, if it has some part in inducing the student reader to delve deeper into the subject, if it conveys to the general reader a picture of the problems of this branch of English law, I shall have achieved my object.' The production of a book scarcely more than 50,000 words in length and upon a subject of such complexity as the conflict of laws, which is at the same time a cram book for professional examinations, an appetizer for the more serious student, and profitable reading for the layman ignorant of domestic law and unversed in the ways of legal thinking, would indeed be a very considerable achievement. Such a success was the late Professor Brierly's in 1928 when his *The Law of Nations* first appeared. It is not so with Mr. Thomas. To say this is not to deny that his book may prove to be of value. But, as in outlining his three-fold purpose the author was (in the present reviewer's opinion) being optimistic to the point of losing touch with reality, so by comparison his performance must inevitably savour of failure.

The great merit of this book is as a summary of the 'black-letter law', which is, in most respects, accurate, concise, well-ordered, and well-balanced. The author has boiled down into remarkably small proportions a great deal of material. It is possible to offer a few isolated criticisms of the way in which this has been done. For instance, it is surprising that any treatment of the problem of legitimacy should omit all reference to the House of Lords case of *Shaw v. Gould*<sup>1</sup> apart from two footnotes (p. 69 and p. 72): in neither is mention made of facts or reasoning, and comment is limited to 'cf.' in the former and to 'ante' in the latter. This particular omission is perhaps significant: Mr. Thomas propounds the doctrine that legitimacy is usually to be regarded as a matter of construction and submitted to the *lex successionis*. Whatever may be said for and against

<sup>1</sup> (1868), L.R. 3 H.L. 55.

the merits of this view as a conclusion to be drawn from the present state of English authorities, little is to be said for avoiding full acknowledgement of the more orthodox doctrine that legitimacy depends in private international law, as in domestic law, upon birth in lawful wedlock.

Again, one might perhaps have thought that any survey of the history of the subject in England, however brief (Mr. Thomas devotes three pages to it), should contain some reference to Westlake.

The chapter on the recognition and enforcement of foreign judgments covers eighteen pages: nowhere is anything said of the leading Court of Appeal case of *Vadala v. Lawes*.<sup>1</sup> In this chapter, however, some space (p. 152) is devoted to Horridge J.'s decision in *Rudd v. Rudd*,<sup>2</sup> which the author seems to regard as having turned on the circumstance that adequate notice of the Washington divorce proceedings had not been given to Mrs. Rudd. It is interesting to note that Dr. Cheshire has interpreted the *ratio* of this case in the same way, although in a footnote he adds that 'an additional ground of invalidity was the uncertainty whether the husband had acquired a domicile in Washington State'.<sup>3</sup> It is submitted with respect that this is misleading. Horridge J. said quite clearly: 'The onus of proof of a change of domicile is on the party who alleges it. I am not satisfied that the husband ever obtained an American domicile, and, therefore, I hold that the American Court, which pronounced the decree, had no jurisdiction.'<sup>4</sup> It was only after this that the learned Judge considered the effect of lack of notice to the defendant in the foreign proceedings. At the end of his judgment he said: 'The petitioner in this case had no knowledge of the American proceedings, so on this ground also the American decree cannot stand.'<sup>5</sup> The main *ratio* of the case would seem, therefore, to depend upon the Washington Court's lack of international competence because the husband had not established a domicile there at the time of the proceedings. This is the interpretation which commended itself to Barnard J. in *Maher v. Maher*<sup>6</sup> (not mentioned by Mr. Thomas) and to Pearce J. in *Igra v. Igra*.<sup>7</sup> Mr. Thomas admits that, as a result particularly of this latter case, 'certainly in a matter of personal status, a decision of the courts of the domiciliary state will be recognised, whatever [the] circumstances' (p. 152). At the same time, however, although castigating the defence of denial of natural justice as 'in every way, unsatisfactory' (p. 151), he cites (pp. 151-2) without disapproval Cheshire's view that 'the most that can be said with certainty is that any impropriety in the foreign proceedings which has deprived a party of an opportunity to present his side of the case will be regarded as a violation of natural justice'.<sup>8</sup> Dr. Cheshire's position, although deriving support from earlier authority, involves, it is submitted, so far as *Rudd v. Rudd* is concerned, failure to identify the true *ratio* of the case and failure to differentiate between, on the one hand, the question of the foreign court's jurisdiction in the international sense, and, on the other hand, the supposed unfairness (i.e. dissimilarity from English domestic law) of the foreign rules relating to internal jurisdiction. It is a pity that Mr. Thomas has marred the consistency of his own position by a somewhat uncertain flirtation with Dr. Cheshire's approach.

The above-mentioned suggested deficiencies are of varying importance. They are, however, isolated. Generally speaking, the author is to be congratulated on his skill in compressing material and on his good judgment in deciding difficult questions as to what to exclude.

<sup>1</sup> (1890), 25 Q.B.D. 310.

<sup>2</sup> [1924] P. 72.

<sup>3</sup> Cheshire, *Private International Law*, 4th ed., p. 633, n. 3.

<sup>4</sup> [1924] P. 72, 76. Italics supplied.

<sup>5</sup> [1924] P. 72, 78. Italics supplied.

<sup>6</sup> [1951] P. 342, 344-5.

<sup>7</sup> [1951] P. 404, 410-11.

<sup>8</sup> Cheshire, *op. cit.*, p. 432.



The production of this book seems to have been a process of rendering down rather than one of distillation. The end-product of the former process, however efficiently it is performed, is seldom exciting. What is served up to the reader is good plain fare, almost exclusively English (or rather British) and not particularly appetizing. It is remarkable that in a book on this subject, mentioning some two hundred cases, reference is made to only one foreign case (*Forgo's case*, at p. 28) and to no Commonwealth cases save a few Privy Council opinions.

The general approach is conservative. Questions are seldom asked and, so far as the present reviewer is concerned, were seldom provoked. There is no hint of criticism of, for instance, the rule in *The Halley*<sup>1</sup> as incorporated into the first part of Willis J.'s oft-quoted dictum in *Phillips v. Eyre*.<sup>2</sup> So, too, the wisdom of the rule, recently affirmed by the House of Lords in *Government of India v. Taylor*,<sup>3</sup> that an English court will not enforce a rule of foreign law which it characterizes as a tax law is not questioned.

Indeed, the generally admitted controversial nature of some problems is sometimes seemingly suppressed. In his treatment of the proper law of the contract, Mr. Thomas devotes three pages to a dogmatic exposition of the subjectivist doctrine. Mention of the existence of a rival view is postponed until the final paragraph (p. 81), where the objectivist approach is dismissed in three sentences. There is little to suggest that in recent years this has been the focal point of violent controversy at least amongst academicians.<sup>4</sup> There is, moreover, nothing to suggest that, although the authorities seem overwhelmingly to support the traditional subjectivist view, nevertheless serious judicial doubts have been voiced as to its adequacy and helpfulness in some types of case. In the Court of Appeal in *The Assunzione*, Singleton L.J. said: 'We have had a considerable number of authorities cited to us upon the question of what law should be applied. The parties did not state their desire, or their intention, upon the subject. It has been said that when that happens one must endeavour to find what the intention of the parties was on the matter. That does not appear to me to be very helpful, for in most cases neither party has given it a thought, and neither has formed any intention upon it; still less can it be said that they have any common intention. . . .<sup>5</sup> In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself. When such a position arises all the relevant circumstances must be borne in mind, and the tribunal must find, if it can, how a just and reasonable person would have regarded the problem.'<sup>6</sup>

The interesting difficulties in determining the scope of the rule that matters pertaining to the mode and manner of performance of a contract are submitted to the *lex loci solutionis* are touched upon only lightly.

When considering the effects in private international law of the Legitimacy Act, 1926, Mr. Thomas writes (p. 70, n. 2): 'Children born in adultery are not excluded under this section [8] if they would be legitimated by the father's domiciliary law: *Collins v. A.-G.* (1931) 47 T.L.R. 484.' He does not mention that a tricky problem of statutory interpretation is involved here, or the significance in this context of the later case of *In re Askew*.<sup>7</sup> There Maugham J. assumed that the Act did not apply as the child had been the product of adulterous intercourse, but that the Common Law rule of *In re*

<sup>1</sup> (1868), L.R. 2 P.C. 193.

<sup>2</sup> (1870), L.R. 6 Q.B. 1, 28.

<sup>3</sup> [1955] A.C. 491.

<sup>4</sup> See especially Mann in *International Law Quarterly*, 3 (1950), pp. 60 and 597, and Morris, *ibid.*, p. 197.

<sup>5</sup> [1954] P. 150, 164. For a critique of this case by Dr. Cheshire see above, pp. 123-9.

<sup>6</sup> *Ibid.*, at p. 176. See also, for example, *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24, *per* Lord Normand at p. 35, *per* Lord MacDermott at p. 42, *per* Lord Reid at p. 52, and *per* Lord Radcliffe at p. 54; in *Zienvostenska Banka National v. Frankman*, [1949] 2 All E.R. 671, Lord Radcliffe again seems to prefer the objectivist view.

<sup>7</sup> [1930] 2 Ch. 259.

*Goodman's Trusts* was still available. This is inconsistent with Bateson J.'s reliance upon the Act in *Collins v. A.-G.* It should be noted, too, that in the *Collins* case itself, on the facts the child could seemingly have been legitimated under the rule in *In re Goodman's Trusts*.

Shortcomings of this sort may, of course, be virtually unavoidable in a book of this size which seeks to perform such diverse purposes. Nevertheless, the restriction of criticism and the glossing over of controversial difficulties is scarcely likely to be instrumental in achieving one of those purposes, namely, 'inducing the student reader to delve deeper into the subject'.

A lay reader must find Mr. Thomas's book highly informative. Sometimes he may be given a slightly false impression of maturity and certainty. At others he may be confused—especially by the treatment of the more general topics. That a brief treatment of a problem such as that of characterization should be somewhat obscure and incomplete is scarcely to be wondered at. The deficiencies in Mr. Thomas's treatment of *renvoi* are, however, in the present reviewer's opinion, less justifiable. The operation of the doctrine in the English courts is minimized. The 'very few cases' (p. 31) to which the author alleges that its operation is limited are presented as unexplained and seemingly inexplicable anomalies. There is no suggestion that the meaning of the word 'law' in any given choice of law rule might be most intelligently discovered by reference to the purpose of the rule in question. The section on domicile is a somewhat jumbled collection of points of detail: the lay reader might perhaps not get a very clear outline of the general notion.

Mr. Thomas takes no chances so far as the elementary education of his readers is concerned. A glossary of Latin tags is provided at the beginning of the book. It tells us, *inter alia*, that '*inter vivos*' means 'between living persons' and that '*forum*' means 'Court: place where an action is brought'. This latter is clarified by a separate entry to the effect that '*lex fori*' means 'The law of the place before whose courts an action is brought'. Nor is the reader's memory overtaxed. When (at p. 98) the phrase '*inter vivos*' is used in the text, there is a reminder of its English meaning. There is at least one occasion on which the meaning of English words themselves is parenthetically illuminated: thus at p. 121 we read: '... whether a person dies testate or intestate (i.e. whether having made a will or not).'

P. B. CARTER

*Conflitti Interni ed Internazionali*. Volume II. By EDOARDO VITTA. Turin: G. Giappichelli. 1955. 266 pp. Lire 2,000.

In the first volume of this work, reviewed in this *Year Book*, 31 (1954), pp. 530-1, the author examined the nature of inter-regional and inter-personal conflict of laws within a State and questions of characterization arising thereunder. He concluded that inter-State and intra-State conflict of laws differ from each other in character, even if the solution of individual cases is similar or identical in both systems. The present reviewer, faced with these conclusions, suggested that what may appear to be a difference in substance can perhaps be explained by the different approach of Continental lawyers towards the sources of law (cf. pp. 38, 41, 49, 67 ff., 82) and that a more definite appraisal could only be attempted after an examination of the operation of inter-regional and inter-personal conflict of laws in relation to specific questions, such as public policy, penal laws, and revenue legislation. In the second volume, the author studies these problems in detail, but although he has devoted much attention to individual legislation



and has made use of the practice of courts, the discussion has remained strongly theoretical.

The book is divided into three parts. In the first part, devoted to the operation of public policy, the author distinguishes between public policy in inter-State conflict of laws, on the one hand, as forming a part of the rules of the conflict of laws, and in inter-regional conflict of laws, where it is enshrined in the rules of substantive law. Such a distinction may be in keeping with the classical notion of public policy in Italy, but it cannot serve as a useful basis elsewhere. Moreover, it is doubtful whether cumulative choice of law rules, one branch of which refers to the *lex fori* (*Spezielle Vorbehaltsklausel*), are special rules of public policy. An examination of the practice of various countries possessing composite legal systems (pp. 30-63) leads the author at first to suggest that public policy fulfils the same function in inter-State and in inter-regional conflict of laws (p. 30), but subsequently such generalization is rejected (p. 82). In so far as the author bases his conclusion on English and American practice (which he does only to a very limited extent), the latter might equally have induced him to deny the existence of a fundamental difference in character between the two types of rules of the conflict of laws.

At the same time, the author takes up the distinction developed in his first volume between conflicts of regional law arising from a division of competences and of rules of the conflict of laws enacted by the central legislature (pp. 45, 85 ff.). Public policy, as a means of excluding another legal system, operates only in the latter case. While this distinction may provide a useful theoretical background, its practical operation is not easily perceived even in regard to the application of the laws of annexed provinces by the courts of the annexing country. The fact that in certain circumstances (see pp. 50, 53, 54) public policy was not resorted to in order to exclude legislation which would have been excluded if it had come before the courts in the different and original character of legislation of the vanquished State, is equally explicable on the ground that in inter-regional conflict of laws public policy is less sensitive (p. 83). The author admits this, so far as the enforcement of judgments is concerned, but attributes this phenomenon to the fact that a division of competences is involved.

The author then turns to the function of public policy in inter-personal law. It may seem to some, and especially to those familiar with the legal systems applicable in certain parts of the Commonwealth, that problems of private international law arise less easily between inter-personal laws, if the administration of group laws is entrusted to separate tribunals and if, moreover, an independent *lex fori* based on central legislation and regulating the same subject-matter is lacking. The experience of Indian courts is particularly instructive for this purpose, but the author touches upon it only lightly. He suggests that in this sphere the fundamental division, introduced by him, between rules of competence and rules of the conflict of laws can be disregarded (pp. 90, 92) and that the question is always whether the group law is contrary to the basic conceptions of the law of the colonizing Power. This thesis is tested by reference to Italian and French practice. The British practice (p. 97: Zanzibar, Palestine) shows only that the central legislature can, in the exercise of its ordinary power, enact mandatory rules which limit the effects of the personal law. The author admits, however, that an overriding central *lex fori* is often lacking (pp. 105, 106), and submits that in these circumstances the courts (assuming that they are not particular to each group) must be guided by the basic principles of their own law (which seems to be the law of the colonizing Power), but cannot substitute the law of the mother country on grounds of public policy (p. 108). He concludes that in this sphere public policy serves to modify local group laws, but does not exclude any legal system, as it does in private international

law proper (pp. 110 ff., pp. 116 ff.). In short, it appears to be a legislative public policy.

The second part deals with the policies and techniques in the employment of connecting factors in inter-regional and inter-personal conflicts of laws for the solution of questions of status. The author notes a tendency to rely, apart from the test of domicile in the sense of residence, on a more stable notion comparable to that of the domicile of origin in Common Law countries (p. 139). It is impossible, however, to agree with the suggestion, which follows that put forward tentatively by De Nova in *Revue critique de droit international privé*, 42 (1953), pp. 146-53, that a reference to the *lex patriae* of a British subject must now be treated as a reference to the law of the country of his citizenship, but space does not permit the development of this objection here. It is also difficult to accept the statement that the notion of domicile in Scotland differs substantially from that in England: see Donaldson in *Transactions of the Grotius Society*, 39 (1954), p. 145, at p. 149. The chapter is enriched by an interesting discussion as to what connecting factors are most apposite to determine the personal law of individuals resident in annexed territories, of those changing their residence from one district to another, and of those possessing a dual connexion or none at all.

This is followed by a detailed examination of the somewhat neglected question as to how connecting factors are to be determined in inter-personal law. Normally the group itself, and the individual, are free to determine membership, subject to the overriding legislation of the central legislature. Here again the Indian experience could have been turned to good use, for it has furnished the pattern for much of the subsequent development in the British colonies and in Palestine. The observations on Indian law (pp. 219, 224) are slightly misleading, inasmuch as they suggest that a change from the personal, religious law to the subsidiary provisions of Indian statute law can be achieved by simple declaration.

The third part deals with *renvoi*. The author notes its limited application in inter-regional conflict of laws, where it can only come into operation if the various regional systems are endowed with separate rules of conflict of laws. Its application in inter-personal law remains even more restricted.

Professor Vitta has done a great service to private international law. By examining the operation of inter-regional and inter-personal conflicts of laws on a broad comparative basis, he has shown that these conflicts are of widespread practical importance, but the dispute whether these systems of the conflict of laws differ in character, and not only in degree, from those treated in Continental literature as inter-State systems of the conflict of laws is likely to continue for a long time.

K. LIPSTEIN

*Théories et Réalités en Droit International Public*. By CHARLES DE VISSCHER. Second edition. Paris: Éditions A. Pedone. 1955. 495 pp.

The immediate success of Professor C. de Visscher's important book, which was reviewed at length in the previous number of this *Year Book* (at p. 507), is attested by the appearance of a second edition within no more than two years. The new edition, although the book has been carefully revised and is longer by some 28 pages, is naturally in the main a reprint of the earlier edition. The chief changes are (1) a new preface, (2) a slight rearrangement of the chapter on 'Sovereignty and International Organisation', and (3) the introduction of an analytical subject-matter index of 14 pages, the former 'general index' being renamed more appropriately 'Index des Noms'.

The author in his new preface interprets the welcome given to his previous



edition as evidence of a disposition on the part of jurists to take a larger account of the realities which hinder the development of international law as well as of those which determine its progress. At the same time, he admits to not having been much impressed by the criticism that his book does not provide either a general theory or a firm systematization of international law:

‘C’est un grief contre lequel nous ne nous défendrons guère, étant de ceux qui sont plus sensibles aux dangers de certaine logique formelle qu’à l’attrait de constructions intellectuelles qui, trop souvent, n’atteignent à l’unité qu’aux dépens de la vérité. Le droit international, dans son expression positive, est encore loin de ce degré d’autonomie qui, dans les disciplines juridiques évoluées, autorise un large emploi des procédés intellectuels de l’élaboration juridique.’

The warning that more harm than good may be done by lawyers attributing to international law a greater degree of advancement and system than it actually has in international affairs is legitimate enough. A disposition to uncritical assertions still characterizes some works on international law, although the tremendous evolution through which international society is now passing has made most writers more conscious of *réalités* and more inclined to cautious statement. But, while Professor Charles de Visscher’s insistence on due account being taken of *réalités* may have salutary effects, there is equally a danger that the pendulum may swing too far. It is as easy to underestimate as it is to overestimate the part played by international law in the political actions of States, and it is but a short step from emphasizing *réalités* to thinking of international law as something ‘dangerously near to being a simulacrum of law, an attorney’s mantle artfully displayed on the shoulders of arbitrary power (Zimmern, *The League of Nations and the Rule of Law* (1936), p. 94). It is also all too easy to smother and stifle an embryo and even an accepted legal rule by political *réalités*. It is, therefore, very fortunate that the book under review was written with such restraint and by so judicious an author.

C. H. M. W.

*Cases and Materials on International Law*. By LESTER B. ORFIELD and EDWARD D. RE. London: Stevens & Sons Ltd. 1956. 781+xvi pp. £4. 4s.

The American collection of materials on public international law best known to English students and most used by English teachers is probably Professor Briggs’s *The Law of Nations: Cases, Documents and Notes*. This was made readily available to English readers by Messrs. Stevens & Sons Ltd. under the auspices of the London Institute of World Affairs. The same publishers, acting under the same auspices, have now made equally available *Cases and Materials on International Law* by Professor Orfield, of the University of Indiana School of Law, and Professor Re, of St. John’s University, New York. Professor Briggs’s book first appeared in America in 1938 and the very considerably revised current second edition appeared in the United Kingdom in 1953. Professors Orfield’s and Re’s book is an altogether new compilation, for it first appeared in the United States as late as 1955. When considering its characteristics, and when hazarding a guess as to the part which it is likely to play in the exposition of international law in the United Kingdom, and perhaps also in other Commonwealth countries, some comparison with Professor Briggs’s book is, in the circumstances, difficult to avoid. Happily, however, a reviewer is not called upon to attempt any invidious comparative evaluation in terms of simple merit, because neither the characteristics nor the purposes of the two books are exactly co-extensive.

Whereas the older book is now, as its author pointed out in his preface to the second edition, 'a combined treatise and documentary source book on international law', this new book is essentially a collection of cases and materials. It is approximately two-thirds the size of Professor Briggs's book and this difference in size is in some part, although not entirely, due to the fact that Professors Orfield's and Re's notes are generally briefer. They are profuse in number but they are not often attempts at comprehensive summary. They do not clothe the book with the appearance of a treatise. Usually they raise shortly and clearly points and issues arising from, but generally ancillary to, the substance of the main body of the collected materials.

Professors Orfield's and Re's notes are, in addition, an important part of the bibliographical equipment of the book, for they almost always contain an excellent array of references to other sources and literature dealing with matters of detail. In an appendix there is a 'Selected General Bibliography' on international law: here the compilers have been perhaps too selective. In a separate appendix there is a full and interesting collection of references to literature on the teaching of international law. At the head of each of the thirteen Chapters into which the book is arranged, there is a useful 'Chapter Bibliography'.

Although not a treatise, this is very far from being simply a casebook. There are, of course, many areas of international law in which convenient cases either do not exist or are not adequate as vehicles of exposition. Necessity in these instances prescribes the inclusion of other kinds of materials to fill the gaps as the only alternative to recourse to a treatise technique or the emergence of an incomplete and uneven product. Professors Orfield and Re have, however, gone considerably beyond the stark demands of necessity. There is no sign of any prejudice in favour of the use of a case rather than a document when the former is available but the latter is adjudged more efficient as a means of exposition. The authors appear to be inhibited by the tradition of the American case-method as applied to the teaching of domestic law subjects in what Professor Yntema has recently, in a different context, called 'the halcyon, horse and buggy days of Langdell' ([*American Journal of Legal Education*, vol. 7, at p. 563]). The authors have included materials from a wide variety of sources, and not least from very modern sources. This quality of 'up-to-dateness', the importance of which in this subject at this time can scarcely be over-estimated, also characterizes many of the editors' notes. 'Cold war', for instance, takes its place 'as a *sui generis* category in the field of non-amicable measures short of war' (p. 617). It is distinguished from retorsion and other retaliatory measures and from war. Its characteristics are examined. Although its basic features are recognized as being by no means new, it is emphasized that "'cold war" in its totality and intensity as it appears today is a product of our modern age'. Doubts raised recently in a United States federal court<sup>1</sup> as to the contemporary validity of the classic distinction between 'friendly' and 'hostile' States are mentioned (p. 619). Refreshing too is the authors' unwillingness to regard as a waste of space the inclusion as a separate item of Justice Holmes's reverie of optimism: 'I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.' (Holmes, *Law and the Court*; Collected Papers, 291, 296; Orfield and Re, p. 602.)

Two general comments—to some extent interrelated—occur to the present reviewer. First, there seems to have been, both in the selection of the materials which are pre-

<sup>1</sup> *Hungarian People's Republic v. Cecil Associates Inc.*, 118 F. Supp. 954 (D.C.S.D. N.Y. 1953).



sented and in the compilation of references to other materials, a strong preference for anything of United States or British Commonwealth (particularly United Kingdom) origin. Some preference of this sort in a book designed to interest and instruct English-speaking peoples is virtually inevitable and indeed desirable. The authors in their preface refer to the overwhelming number of national cases which deal with principles of international law. It is in such domestic surroundings that most law students will in later life meet their international law problems. But it might be argued that the present authors have gone too far in meeting this need and that the value of the book, even for lawyers trained in the Common Law tradition, would be enhanced by the inclusion of a larger number of non-English-language materials (in translation) and of more references (which after all take up very little space) to foreign literature.

The second point arises from the fact that the arrangement, and to a lesser extent the substance, of the book are clearly designed to suit the United States reader. This is not a criticism. It is, however, something that strikes the foreign reader. The extent to which this reduces the value of the book for him varies from topic to topic. The chapter (2) on international agreements, placing, as it must for American readers, emphasis on the local constitutional requirements and their ramifications, suffers in this respect. So too, amongst others, does the section on the 'Legal Basis of Claims' in the chapter (11) on 'State Responsibility and International Claims'. Again, the non-United States reader may not find the selection of entries for inclusion in the chapter 'Bibliographies' entirely satisfactory. For example, in that at the head of the chapter (7) on Nationality, Gettys: *The Law of Citizenship in the United States* is mentioned, but Dr. J. Mervyn Jones's *British Nationality Law* (formerly *British Nationality, Law and Practice*) is not.

It is not suggested that the authors were in any way at fault in catering for the needs of the person for whom their book was primarily designed, namely, the American student. Moreover, that this has been done does give the book a special value for the English reader who is anxious to acquire a working knowledge of peculiarly American problems of approaching international law.

The technical side of the production of the book is reasonably good. The use of the same size of type for materials and editors' notes is pleasing. The incorporation into the latter of the citation of references has enabled a morass of footnotes to be completely avoided. But the inclusion of a full system of cross-references showing that a case or document mentioned on one page is set out on another would have been helpful.

There are a few minor points concerned with the mechanics of presentation which may disturb some English readers. Failure to italicize the names of cases referred to in the notes may displease some. Professor Briggs did this, although the practice is not so common in the United States as it is in the United Kingdom. More serious for the English reader is the method of citation of some English cases. Few would immediately recognize *Re Visser*<sup>1</sup> by the name *Queen of Holland (Married Woman) v. Drukker*. It is under this guise alone, however, that it appears in the text (at p. 351) and the table of cases.

The general arrangement of the chapters follows more or less traditional lines. An interesting variation is the collection in a chapter (10) under the heading 'International Administration of Justice' of materials on international crimes, extradition, judicial assistance (i.e. obtaining evidence for foreign courts, &c.) and the enforcement of foreign judgments. As the authors explain in their preface, 'All of these materials, indicating what might ultimately come to be called an international judicial process, should be compared with the ever-growing body of bilateral and multilateral treaties

<sup>1</sup> [1928] Ch. 877. The citation of this case is one of the occasions on which the authors use round rather than square brackets.

that Professor Manley O. Hudson has described as "International Legislation"'. Worthy of special mention, too, is the section (pp. 552-82) on the procedural aspects of international claims.

Professors Orfield and Re are to be thanked for having produced this valuable collection of materials. As has been suggested already, the editors' notes, although admirable and an integral part of the book, do not convert the whole into a substitute for a treatise. It will, therefore, for the English reader at least, tend to perform the function rather of a supplement: but to him, so wedded to the textbook and the treatise that he seeks no substitute, this seems largely a virtue. For him its special, although not its only, qualities are perhaps two. It makes available to him some materials, particularly those other than cases, which he would otherwise find not easily accessible. It gives him in concise and comprehensible form a survey of international law from the point of view of the United States lawyer. Both the importance of the materials themselves, and the importance of understanding an approach, so similar and so different, to what is basically a unitary subject, are self-evident.

P. B. CARTER

*Annuaire Français de Droit International*, 1955. Volume I. Paris: Centre National de la Recherche Scientifique. 1956. iv+835 pp. 2,400 francs.

The birth of a French Year Book of International Law is a notable event. France already had important journals dealing with international law. Now, owing to the initiative of the French group of the Anciens Auditeurs de l'Académie de Droit International de la Haye, she has also a Year Book. As Professor Gidel says in a preface to this first number, the high standard of the Year Book is guaranteed by the presence at the head of the Editorial Committee of the name of Professor Bastid, the distinguished daughter of Judge Basdevant of the International Court of Justice.

The plan of the new Year Book is perhaps nearer to the plan of the *American Journal of International Law* than to that of this *Year Book*; and it has some features peculiar to itself. It begins with a title 'Études' which contains twenty-four articles and notes occupying 257 pages, or rather less than one-third of the volume. There follows a much longer title of some 440 pages entitled 'Chroniques', which is divided into seven chapters: (1) Jurisprudence Internationale, (2) Nations Unies et Organisations Internationales Générales, (3) Organisation de l'Europe, (4) Principaux Textes intéressant le Droit International Public publiés au Journal Officiel, (5) Jurisprudence Française intéressant le Droit International, (6) Pratique Française du Droit International Public, and (7) Chronologie des Faits Internationaux d'Ordre Juridique. Next, there is a 'Documents' section of some 40 pages, and then there comes a section, entitled 'Bibliographies', which is divided into (1) Bibliographies Critiques and (2) Index Systématique des Ouvrages et Articles en Langue Française. The volume concludes with a brief note on the teaching of international law in France. The new Year Book is, therefore, decidedly ambitious in its scope, and the Editorial Committee have had the formidable task of bringing out a first number which, including the index and table of cases, extends to 835 pages.

The twenty-four *Études* vary in length from 28 to 3 pages and comprise what in this *Year Book* would be Notes as well as Articles, and they are by no means exclusively devoted to international law. International relations, as Professor Gidel observes in his preface, and the sociology of international law, as the Editorial Committee emphasize in their foreword, are given an important place in the articles. In some articles, indeed, although the author does not fail to note a legal point the political aspects of the sub-



ject are predominant. This feature of the Year Book is deliberate, and reflects the view of the Editorial Committee that the study of international law 'ne peut négliger, dans bien des cas, les considérations de temps et de lieu, la dimension des problèmes, les dispositions psychologiques des protagonistes, bref tout ce qui peut faire comprendre l'origine et la portée de la règle de droit'.

The larger *Études* include a paper on 'Les Bases Militaires à l'Étranger' by Professor M. Flory, in which he draws an interesting distinction between the case where the military base on foreign territory derives from and is governed by a bilateral agreement and the case where it derives from and is governed by a federal (or quasi-federal) instrument like the North Atlantic Treaty. He analyses the main features of the régimes found under (1) 'federal' and (2) bilateral agreements. As to 'federal' agreements, he stresses that it is the Organization itself, e.g. N.A.T.O., which, as a distinct legal personality, acquires and holds the base and to which attaches any special privileges and immunities. He says that the practice in 'federal' agreements is to adopt the British doctrine in regard to privileges and immunities which gives pre-eminence to the authority of the territorial State rather than the United States doctrine which gives pre-eminence to the authority of the foreign force. He points out that a foreign-base agreement of the classical bilateral type always tends to set up an inferiority complex in the territorial State resulting in friction, and that this difficulty begins to disappear when the base is established by a 'federal' organ on the N.A.T.O. model. He foresees that the 'federal' agreement type of base will be the type of the future both because it more easily reconciles the competing national sovereignties and because it accords with the tendency towards a closer integration which characterizes international relations in the post-1945 period. Privileges and immunities—this time of diplomatic and consular agents—is the subject also of a paper by Professor M. Chrétien entitled 'Note Documentaire sur les Immunités Fiscales dont bénéficient en France les Agents Diplomatiques et Consulaires en vertu des Lois et des Tolérances Administratives.' The tax and other fiscal privileges and immunities of diplomatic and consular agents is a subject which lies in the twilight between comity and custom and is one about which it is not easy to obtain information. Professor Chrétien, in his full and detailed 'documentary note', has largely filled this gap so far as concerns French practice. A third *Étude*, by M. P. Louis-Lucas, deals with the host State's duties in insuring the inviolability of the premises of diplomatic missions as illustrated in the incident of 14 February 1955 in which a handful of Roumanian émigrés invaded and captured the Roumanian Legation in Berne. The author considers it difficult to establish any want of due diligence on the part of the Swiss Government in failing to discover and frustrate the plans of the émigrés, but considers that *prima facie* the Swiss authorities did not act with sufficient promptness in ejecting them and preserving the secrecy of the archives. On the other hand, he seems to think that Swiss 'neutrality' between East and West may have afforded some justification for the hesitant action of the Swiss authorities in the particular circumstances of this incident.

Dr. G. Fischer's excellent paper, 'Les Relations entre les États-Unis et la République de Panama', has a topical interest in view of the repercussions in Panama of the Suez Canal question. Dr. Fischer gives a succinct account of the legal status of the Panama Canal and then reviews the legal relations of the United States and Panama in regard to the canal. A feature of the paper is the numerous and useful references in the footnotes drawn from a wide variety of sources. Another paper concerned with Latin America is by Professor R. P. Dupuy, who examines 'L'Application du Traité d'Assistance Réciproque de Rio de Janeiro dans l'Affaire Costa-Rica-Nicaragua'. He traces the successful handling in 1955 of the serious dispute between Costa Rica and Nicaragua

by the Council of the Organization of American States, attributing it to a courageous exercise by the Council of powers which the Pact of Bogotá vests in the meeting of Ministers rather than the Council. He maintains that an occasionally convened body like the meeting of Ministers is unsuitable to discharge the functions of a 'security' council and that the Council, being a permanent commission of ambassadors, is a more effective body for the purpose. At any rate, as he observes, the recent incident has shown the growing importance of the Council as a substitute for the meeting of Ministers in the 'government' of the Organization of American States.

Germany is the subject of three of the *Études*. Professor M. Virally, in an interesting discussion of 'La Condition Internationale de la République Fédérale d'Allemagne après les Accords de Paris', stresses that the determining factor in the status of the Federal Republic is the division of Germany. He points out with considerable skill the subtle difference between the status of the Federal Republic under the 1949 régime and its status today, and he underlines the importance of the reservation of their prerogatives with respect to the whole of Germany by the three Western Occupation Powers in relation to the political problem of the unification of Germany. The particular position of Berlin is examined in another short paper, by M. Jacques Lefrette, who describes it as more a political situation of fact than a legal status. The third *Étude*, 'Les Accords de Paris devant le Parlement Français', by M. A. Cocatre-Zilgien, analyses briefly the positions of the various groups in the French Parliament on the question of the Paris Agreements. Two further *Études* deal with the Franco-German problem of the Saar. The first, 'L'Accord Franco-Allemand du 23 Octobre 1954, sur le Statut de la Sarre', by Professor M. Merle, examines the position of the Saar up to the Agreement which provided for a referendum on the future status of the territory, while the second, by M. D.-H. Vignes, is a critique of the actual referendum held a year later under the aegis of Western European Union. M. D.-H. Vignes expresses the view that the conditions under which the referendum was held were distorted by the attitude of the German Government and that, in any event, a referendum where the choice is between a 'spectacular' and a 'technical' solution is a foregone conclusion.

Professor C. Chaumont has a short but penetrating *Étude* on 'La Neutralité de l'Autriche et les Nations Unies', in which he considers the question whether the 'neutrality' undertaken by Austria as the price of her liberation from Soviet occupation is reconcilable with her membership of the United Nations. He suggests that, while the collective security system of the United Nations remains in fact a partial system, it may validly be held that a very special case of neutrality like that of Austria may constitute a positive contribution to collective security and, therefore, *pro tempore*, be compatible with the State's obligations under the Charter. In 'Le Principe de l'Unanimité dans les Organisations Européennes', M. D.-H. Vignes points out that, despite the relative homogeneity of their civilization, European States cling to the rule of unanimity in all decisions of principle in order to preserve intact their individual sovereignties. At the same time he notes, as hopeful tendencies in some European organizations, a disposition not to insist on the rule of unanimity in the *application* of agreed principles and to settle for a more limited agreement amongst a number of States rather than be thwarted by a failure to obtain total unanimity (e.g. in the case of the European Coal and Steel Community). Another *Étude* dealing with international organization is an excellent paper by Dr. G. Fischer on 'La Co-opération Internationale en Matière d'Utilisation Pacifique de l'Énergie Atomique'. He first makes a critical analysis of the bilateral agreements made by the United States for the peaceful use of atomic energy (the Soviet agreements have not been published), pointing out how these fundamentally affect any multilateral agreements in the same field. He then discusses the United



Nations proposals for a general International Atomic Energy Agency and the European schemes for organized co-operation in the peaceful uses of atomic energy. The paper is a comprehensive and well-documented review of this difficult subject.

Professor R. Pinto, in 'Les Conventions du 3 Juin, 1955, entre la France et la Tunisie', analyses the régime of the Franco-Tunisian 'community' set up by the 1955 Conventions, which he sees as a true form of federal union between the two countries. His warning that the realization of this régime in actual practice is not to be taken for granted has been underlined by subsequent events. Two brief *Études* are devoted respectively to South and North Viet-Nam. An unnamed writer, in 'L'Administration du Viet-Nam Sud', seeks to remove a misconception that the French Military Command is responsible under the Geneva Agreements for the civil administration of South Viet-Nam. Professor H. Thierry, in 'La Condition Juridique du Nord Viet-Nam', concludes that North Viet-Nam is recognized *de jure* by the Soviet bloc, *de facto* by France, and not at all by the United States. Another useful Far-Eastern paper is a historical review by Professor C.-A. Colliard of 'La Question de Formose'.

M. M. Le Poitcevin, in 'Que signifie l'Article 14 de la Convention de Bruxelles du 23 Septembre, 1910, pour l'Unification de Certaines Règles en matière d'Assistance et de Sauvetage Maritimes', gives an interesting account of the interpretation of the Article in the jurisprudence of national tribunals on the question of salvage services rendered by and to warships. M. H. Coursier provides a note on the 'Définition du Droit Humanitaire', in which he concludes that it is the totality of the rules and principles proper for the protection, at all times and in all circumstances, of the rights essential to the dignity of human beings. Other notes are contributed by M. S. Cocatre-Zilgien on 'La Compatibilité du Pacte Turco-Irakien et des Obligations Internationales Antérieures des États Signataires', by Professor M. Lachs on 'Le Traité de Varsovie [Warsaw] du 14 Mai, 1955', by M. D.-H. Vignes on 'La Commission de Conciliation Franco-Italienne', by Dr. G. Fischer on 'Le Mode de Règlement des Différends adopté par l'Accord International sur le Blé', and, finally, by Père J. Lucien-Brun on 'La Politique Concordataire de Pie XII'.

A most useful chapter covering the jurisprudence of international tribunals, under the general editorship of Professor M. Grawitz, includes: (a) an analysis and criticism of the International Court's two Judgments in the *Nottebohm* case (*I.C.J. Reports*, 1953, p. 111, and 1955, p. 4) and its Advisory Opinion on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa* (*ibid.*, p. 67); (b) an interesting account of a decision of the United Nations Tribunal for Libya dealing with the succession of Libya to the public property of the Italian State in Libya; (c) a digest of six decisions of the United Nations Administrative Tribunal; (d) a digest of nine decisions of the Administrative Tribunal of the International Labour Organization; (e) a critique of the first seven cases before the Court of the European Coal and Steel Community; and (f) a strong criticism of the *Mackay Radio and Telegraph Company* case before the Appeal Court of the International Tribunal of Tangier, in which the Court declined to consider itself bound by the jurisprudence of the International Court of Justice.

No less useful are the two chapters on international organization, which contain upwards of twenty notes by various writers on selected topics. The first deals with the United Nations and General International Organizations and the second with the Organization of Europe. The subjects covered in the United Nations and general chapter are: (a) the participation of non-Member States in the work of regional economic commissions, the powers of the Secretary-General, disarmament, co-ordination of the work of the United Nations and the Specialized Agencies in the field of technical

assistance, the work of the International Law Commission, codification of customs of international trade in the framework of the regional economic commissions of the United Nations; (b) the tripartite character of the International Labour Organization (with particular reference to the Soviet Union's application for membership), the representation of dependent territories at the Conference of the I.L.O., the privileges and immunities of delegates and functionaries of the I.L.O. (with particular reference to the expulsion of M. Vermeulen from Venezuela); (c) the Headquarters Agreement between U.N.E.S.C.O. and France; and (d) the new Organization for Trade Co-operation. The subjects covered in the European section (which is taken to include the North Atlantic Treaty Organization) are: (a) the aims and organization of the Council of Europe; (b) the O.E.E.C. Monetary Agreement of 1955; (c) the obligation of the N.A.T.O. Powers to consult amongst themselves under Article 4 of the North Atlantic Treaty, the legal personality of N.A.T.O. and a number of other N.A.T.O. matters; (d) Western European Union; (e) the European Conference of Ministers of Transport; (f) the Intergovernmental Committee for European Migration; and (g) the Central Commission for Rhine Navigation. The foregoing summary is a sufficient testimony to the range and interest of this chapter.

There follows a chapter, prepared by Dr. J. Personnaz, in which are noted and summarized the texts of numerous French decrees 'publishing' international agreements to which France is a party. The next chapter, summarizing French decisions for the year 1934 on points of international law, is prepared by M. L. Muracciole and contains short notes of the cases rather on the lines of the cases section of the *American Journal of International Law*. This chapter will be of great assistance to lawyers of other countries in enabling them to keep track of any important rulings on international law in French courts, as will be the subsequent chapter in bringing to their attention pronouncements by the French Government on points of international law. The latter chapter, on 'French Practice', is arranged—alphabetically—by subject-matter and consists principally of extracts from official statements made in the French Parliament or to the Press, with a brief account of the context in which they were made. After this chapter comes a month-by-month diary for 1955 of events having an interest for international lawyers. The selection has been carried out with considerable skill and the diary should prove a useful aid to tracing particular events or ascertaining their correct sequence. The Documents chapter sets out to reproduce only important texts which have not had a wide circulation. The Franco-Indian Agreement concerning the French Settlements in India and the 1955 Conventions between France and Tunisia, for example, are reproduced, and this feature of the *Annuaire* will provide a useful service for all international lawyers. The 'Bibliographie Critique' contains book reviews on normal lines; but it is followed by a novel feature of considerable interest in the form of a systematic bibliography of all books and articles relating to public international law published in French during 1954 and the first ten months of 1955. This bibliography has every claim to be termed systematic since the listing of the books and articles is worked out in accordance with their subject-matter and follows a set plan which has twelve sections divided into numerous subsections. The care which has been devoted to this systematic bibliography can be judged from the fact that over 700 books and articles from widely varying sources have been collected and listed under their appropriate subject-headings. The value of the bibliography as a technical aid to all who work in the field of public international law is self-evident. The volume ends with a full table of contents and a serviceable index. It is well printed and firmly bound in dark grey cloth boards.

Enough has been said to indicate that, by the standard of this first volume, the



*Annuaire Français* constitutes an important addition to the periodical literature of international law. Those concerned are to be congratulated on their initiative and on the quality of this volume. The price—2,400 francs—is very reasonable for a book of over 800 pages containing so much useful material, and the *Annuaire* should find its way on to the shelves of all law libraries and of many international lawyers.

C. H. M. W





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